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Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM 1988

LO SHIPPERS ACTION COMMITTEE

Petitioner

vs.

INTERSTATE COMMERCE COMMISSION, Et Al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD E. SPENCER*
STEPHEN C. HERMAN
BELNAP, SPENCER, MCFARLAND,
EMRICH & HERMAN
20 North Wacker Drive, #3710
Chicago, IL 60606
(312) 236-0204
Attorneys for Petitioner

DATED: February 16, 1989

SCHEFFER PRINTING SERVICES, INC. — (312) 263-6850

*Counsel of Record

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QUESTIONS PRESENTED

1. Whether, when a complaint has been filed with the Interstate Commerce Commission (ICC) alleging that allowances paid by railroads to private rail car owners for the use of their cars are not in conformity with 49 U.S.C. §11122(b), the Commission has discretion to regulate or not to regulate such allowances as it sees fit?

2. Whether §11122(b), may, during a period of car surplus, be construed so as to permit railroads to impose on unwilling shippers allowances below the cost of owning and maintaining such cars?*

3. Whether, when the existing allowances have been shown to be below the cost-of-ownership standard of §11122(b),

* Unless otherwise indicated, all statutory references are to 49 U.S.C.

the ICC, by declining to prescribe just and reasonable allowances for the future, can effect de facto deregulation of such allowances without following the exemption procedures required by 49 U.S.C. §10505?

LIST OF PARTIES

The following were parties to the proceeding in the Court of Appeals:

Lo Shippers Action Committee (LOSAC),
Petitioner.

LOSAC is an unincorporated non-profit association formed for the purpose of securing just and reasonable compensation for the use by the railroads of privately-owned covered hopper cars (classified by the Association of American Railroad for mechanical purposes as type "LO" cars). The members of LOSAC are listed below.

The Interstate Commerce Commission
The United States of America,
Respondents.

U.S. Clay Producers Traffic Association, Inc.,
Intervenor in Support of Petitioner.

Association of American Railroads
Consolidated Rail Corporation,
Intervenors in Support of Respondents.

Itel Rail Corporation,
Amicus Curiae.

LIST OF CURRENT MEMBERS OF LO SHIPPERS ACTION COMMITTEE

A. E. Staley Manufacturing Company
Agrico Chemical Company
American Grain and Related Industries
Allied/Signal Corporation
American Colloid Company
American Cyanamid Company
Amoco Chemicals Corporation
Archer Daniels Midland Company
Badische Corporation
Bay State Milling Company
Benson-Quinn Company
Blue Circle Atlantic Co.
Borden Chemical Division of Borden, Inc.
Bunge Corporation
Carborundum Electro-Minerals Co.
Cargill Incorporated
Carlon Electrical Services, Inc.
John S. Carlson & Co., Inc.
Central Soya Company, Inc.
CertainTeed Corporation
CF Industries, Inc.
Chevron Chemical Co.
Chevron, U.S.A.
Chicago Freight Car Leasing Co.
Church & Dwight Co., Inc.
Climax Chemical
Con Agra, Inc.

LIST OF MEMBERS (Cont.)

Continental Polymers
CPC North America – Division of CPC International
Diamond Crystal Salt Company
Dixie Portland Flour Mills, Inc.
The Dow Chemical Company
E.C.C. America, Inc.
E. I. du Pont de Nemours & Co.
Eagle-Picher Industries, Inc.
Englehard Minerals & Chemicals Division
ERCO, a Division of Tenneco Canada, Inc.
Exxon Chemical Americas
Farmland Industries, Inc.
FMC Corporation
Fina Oil & Chemical Company
First Mississippi Corporation
Foote Mineral Company
Gardinier, Inc.
Garvey Elevators, Inc.
General Chemical Corporation
Georgia Gulf Corporation
Georgia Kaolin Company
Gold Kist, Inc.
B. F. Goodrich Chemical Group
Great Lakes Carbon Corporation
Harvest States Cooperatives
Helm Financial Corporation
Holly Sugar Corporation
Honeymead Products Co.

LIST OF MEMBERS (Cont.)

The Hubinger Company
ICI Americas, Inc.
International Minerals & Chemical Corporation
International Multifoods Corporation
ITT Continental Baking Company, Inc.
J.M. Huber Corporation
Kerr-McGee Chemical Corporation
Lauhoff Grain Company
Louis Dreyfus Corporation
Manville Sales Corporation
Merchants Investment Co.
Mile High Railcar
Monsanto Company
Morton Thiokal, Inc.
National Starch and Chemical Corporation
North Dakota Mill & Elevator Company
Northbrook Corporation
Novacor Chemicals, Ltd.
Occidental Chemical Corporation
Olin Corporation
Ozark-Mahoning Company
Penick & Ford, Ltd.
Phillips 66 Company
The Pillsbury Company
Potash Company of America
The PQ Corporation
Rail-Lease Inc.
Royster Company

LIST OF MEMBERS (Cont.)

J. R. Short Milling Company
Sohio Electro Minerals Co.
Soltex Polymer Corporation
Stauffer Chemical Company
Temco Corporation
Tennessee Eastman Company
Texasgulf Chemicals Co.
Thatcher Glass Corporation
Union Carbide Corporation
Union Equity Co-Operative Exchange
U.S. Borox & Chemical Corporation
Witco Chemical Corp.
Zip Transportation Co., Inc.

Associate Members

ACF Industries, Inc.
General American Transportation Company
General Electric Railcar Services Corporation
Itel Rail Corporation
Pullman Leasing Company
Union Tank Car Company

TABLE OF CONTENTS

REPORTS AND OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THE CONSTRUCTION OF §11122(a) AND (b) INVOLVES IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT 7

II. THE DECISION OF THE COURT OF APPEALS IS PATENTLY ERRONEOUS 11

A. There Is No Way §11122(b) Can Be Construed To Require Shippers To Accept Allowances Below Cost of Ownership, Even In Times Of A Car Surplus 11

B. The Court of Appeals Decision Is In Conflict With *General American T. Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940), and Deprives Petitioner of Remedies Guaranteed It By The Interstate Commerce Act. 22

C. The Court of Appeals' Decision Effects De Facto Deregulation of Covered Hopper Car Allowances, In Violation Of 49 U.S.C. §10505(a) 25

CONCLUSION 26

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

APPENDIX E E-1

TABLE OF AUTHORITIES

CASES **PAGE(S)**

American Min. Congress v. U.S. E.P.A., 824 F.2d 1177 (D.C. Cir. 1987) 12

Aranda v. Pena, 413 F. Supp. 849 (S.D. Fla. 1976) 19

Atchison, T. & S. F. Ry. Co. v. United States, 617 F.2d 485 (7th Cir. 1980) 12, 18

Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973) 24

Car Service Compensation – Basic Per Diem Charges, 358 I.C.C. 716 (1977) 10, 14

Car Service Compensation – Basic Per Diem Charges, 361 I.C.C. 189 (1979), aff'd in part, rev'd in part on other grounds *Consolidated Rail Corp. v. United States*, 619 F.2d 988 (3d Cir. 1980) 10

Catano v. Local Board No. 94 Selective Service System, 298 F. Supp. 1183 (E.D. Pa. 1969) 22

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 11

Consolidated Rail Corp. v. United States, 619 F.2d 988 (3rd Cir. 1980) 10, 14

Dixie Carriers, Inc., Rates and Allowances, 278 I.C.C. 417 (1950) 8

F.P.C. v. Texaco, 417 U.S. 380 (1974) 24

Farmers Union Cent. Exch. Inc. v. F.E.R.C., 734 F.2d 1486 (D.C. Cir. 1984) 24

General American T. Car. Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940) 22

CASES **PAGE(S)**

Increased Per Diem Charge On Freight Cars, 268 I.C.C. 659 (1947) 15

Israel-British Bank (London) Ltd. v. Fed. Dept. Ins. Corp., 536 F.2d 509 (2d Cir. 1976), cert. den., 429 U.S. 978 12

Investigation Of Adequacy Of Freight Car Ownership, 1 I.C.C. 2d 700 (1985) 9

LO Shippers Action Committee v. Aberdeen and Rockfish Railway Company, Et Al., ICC Docket No. 39117, 4 I.C.C.2d 1 (served August 31, 1987) 1, 6

LO Shippers Action Committee v. Interstate Commerce Commission, 808 F.2d 64 (D.C. Cir. 1986) 5

LO Shippers Action Committee v. I.C.C., 857 F.2d 802 (D.C. Cir. 1988) 1, 6, 10, 12

LO Shippers Action Committee v. Reese H. Taylor, Jr. Et Al., No. 84 C 3034, slip op. (N.D. Ill. E.D. Sept. 3, 1986) 5

Long Island R. Co. v. United States, 318 F. Supp. 490 (1970) 14

MCI Telecommunications Corp. v. F.C.C., 765 F.2d 1186 (D.C. Cir. 1985) 23,24

Mileage Allowances For Covered Hoppers, Grain & Grain Products, BN, ICC Docket No. 39908 (not printed), served December 5, 1985 . . . 4

Mileage Allowances On Refrigerator Cars, 218 I.C.C. 359 (1936) 8, 23

Palmer v. United States, 75 F. Supp. 63 (D.D.C. 1947) 15

CASES **PAGE(S)**

Porter v. Prudential Insurance Co. of America, 470 F. Supp. 203 (W.D. Tex. 1979) 18

Tank Car Allowances In Official Territory, 313 I.C.C. 435 (1961) 8

The Pietro Campanella, 73 F. Supp. 18 (S.D. Tex. 1947) 14

Trailer Marine Transport Corp. v. Federal Maritime Commission, 602 F.2d 379 (D.C. Cir. 1979) 12

Union Pacific R. Co. v. United States, 300 F. Supp. 318 (D. Neb. 1969); aff'd, 396 U.S. 27, reh. denied, 396 U.S. 1030 (1969) 14

United States v. Carolina Freight Carriers, 315 U.S. 475 (1942) 24

United States v. Champlin Refining Co, 341 U.S. 290 (1951) 13

STATUTES

28 U.S.C. –

§1254(a) 2
§2101(c) 2
§2321 2
§2342(5) 2

49 U.S.C. –

§12(1) (former codification) 24
§1(14)(a) (former codification) 14, 15, 17, 18, 23
§10321 (a) 24
§10505 25
§10505(a) 25
§10701 (b) 24
§11705(c)(1) 24
§11122 . . . . . .passim

CONGRESSIONAL MATERIALS

112 Cong. Rec. H10433 (daily ed. May 12, 1966)
(Statement of Rep. Anderson) 16

112 Cong. Rec. H10434 (daily ed. May 12, 1966)
(Statement of Rep. Staggers) 16

112 Cong. Rec. H10437 (daily ed. May 12, 1966)
(Statement of Rep. Springer) 16

112 Cong. Rec. H10439 (daily ed. May 12, 1966)
(Comments of Congressman Brock Adams) 15

126 Cong. Rec. S14011 (daily ed. Spt. 30, 1980) 17

126 Cong. Rec. S14002 (daily ed. Sept. 30, 1980) 17

126 Cong. Rec. H9925 (daily ed. Sept. 29, 1980) 16

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in 1966 U.S. Code Cong. & Ad. News 2228 . . . . . 14, 16

H.R. Rep. No. 96-1430, 96th Cong.,
2d Sess. 117 (1980) 16

H.R. Rep. No. 96-1430, 96th Cong., 2d Session 118 . . .

S. Rep. No. 386, 89th Cong. 1st Sess. 7-8
(June 30, 1965) 16

MISCELLANEOUS

Sec. 140, S.796, Hearings on S. 796 before the
Subcommittee on Commerce, Surface Transportation,
Senate Committee on Commerce, Science and
Transportation, 96th Cong., 1st Sess. 48-49
(April 12, 1979) 20

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Subcommittee on Commerce, Surface Transportation,
Senate Committee on Commerce, Science and
Transportation, 96th Cong., 1st Sess. 73
(April 12, 1979) 20

MISCELLANEOUS (Cont.)

Sec. 301, S.1946, Hearings on S. 1946 before the Committee on Commerce, Science and Transportation, 96th Cong., 1st Sess. 41-42 (November 9, 1979) 20

Section 141, H. R. 4570, House Subcommittee Preliminary Working Draft No. 2 21

Hearings on S. 1946 before the Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess. 152 (November 7, 1979) (Statement of William H. Dempsey) 21

Hearings on H. R. 4570 before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, 96th Cong. 2d Sess. 3 (March 31, 1980) 21

Hearings on H. R. 4570 before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, 96th Cong. 2d Sess. 290 (March 31, 1980) 22

AAR, *Railroad Facts* (1988 ed.) 2, 3, 9

Pub. L. 95-473, 92 Stat. 1337 (1978) 18

Pub. L. 96-448, 94 Stat. 1895 (1980) 3

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REPORTS AND OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A hereto. It is reported as *LO Shippers Action Committee v. Interstate Commerce Commission*, 857 F.2d 802 (d.c.cIR. 1988).

The decision and order of the ICC is reported as *LO Shippers v. Aberdeen & Rockfish Ry. Co. Et Al.*, 4 I.C.C.2d 1 (1987). It is reproduced in Appendix B hereto.

GROUNDS FOR JURISDICTION

The opinion of the Court of Appeals was filed September 23, 1988. A petition for rehearing and suggestion for rehearing en banc were timely filed on November 4, 1988. Both

petitions were denied on November 18, 1988. A copy of the Court's Order denying LOSAC's petition for rehearing is reproduced in Appendix E hereto.

This Court's jurisdiction to review the judgment of the Court of Appeals on certiorari is found in 28 U.S.C. §§1254(a) and 2101(c).

The jurisdiction of the Court of Appeals is found in 28 U.S.C. §§2321 and 2342(5).

STATUTES INVOLVED

The statutes involved are set forth in Appendix C hereto. Appendix D hereto contains the complete legislative development of 49 U.S.C. §11122.

STATEMENT OF THE CASE

As common carriers, railroads must provide all of the services and instrumentalities required to handle the cargoes they hold themselves out to carry. In the case of liquid and dry bulk cargoes, that obligation has been met in whole or in large part by the use of private cars furnished by the shipper for which he receives compensation in the form of a mileage "allowance" published either in the national mileage tariff, known as Mileage Tariff PHJ 6007, or in an individual railroad's tariff.

Private rail cars (i.e., cars of non-railroad ownership) have always composed a significant portion of the national rail car fleet, but never more so than today. In 1929, for example, out

of a total of 2,210,662 rail cars in service, 286,979, or about 13 percent, were owned by non-railroads. AAR, *Railroad Facts* (1988 ed.) 46. At the end of 1987, out of a total of 1,288,129 rail cars in service, shippers and private car companies owned 432,383, or approximately 37 percent. Id. At the end of 1987, roughly 45 percent (127,344) of the entire national covered hopper car fleet was privately owned and 99 percent of all tank cars was privately owned. Id. LOSAC's members own approximately 40,000 covered hopper cars, comprising nearly 14 percent of the total covered hopper car fleet.

A group of shippers, some of whom in the 1960's helped develop the covered hopper car as an alternative to the less secure and efficient boxcar, formed LOSAC in the early 1970's to secure equitable compensation for the railroads' use of their cars. Almost from its inception, LOSAC was either in litigation or negotiation with the nation's railroads concerning proper levels of compensation for the use of their cars by the railroads. These efforts culminated in an agreement, in 1980, between LOSAC and all of the nation's major rail carriers pursuant to which the parties established allowances which fairly reflected the actual costs of owning and maintaining covered hopper cars.

Later in 1980, the Congress enacted the Staggers Rail Act (Pub. L. 96-448; 94 Stat. 1895, Oct. 14, 1980), which ushered in significant regulatory reforms for the railroads, most significantly in the area of rail freight rates. Also in 1980, there developed a surplus of covered hopper cars, growing out of the recession and the Russian grain embargo imposed by the Carter administration.

In response to these events, the railroads, in May of 1982, informed LOSAC's members that they would not implement cost updates for allowances under the 1980 agreement, as they had agreed to do. Concurrently, individual railroads began unilaterally capping allowances, mainly on shipments of grain and grain products, at compensation levels significantly below those which the railroads had only recently agreed with LOSAC's members fairly reflected the actual cost of owning and maintaining covered hopper cars.[1]

LOSAC responded to these allowance caps in several ways, all designed to obtain a definitive ruling on the meaning of §11122(b) in order to end the continuing controversies over allowances at the earliest possible time. LOSAC filed with the ICC, on February 24, 1983, a formal complaint (Dkt. No. 39117) alleging that the allowances imposed on shippers by the railroads were unlawful under the cost-of-ownership standard of §11122(b) and other sections of the Act. This is the case here on review. LOSAC asked the ICC to find the allowances then in effect unlawful, to order the railroads to cease and desist from violations of the Act, to prescribe just and reasonable allowances for the future, and to award LOSAC's members damages for past violations. LOSAC showed that the assailed allowances were substantially below the private car owners' costs of ownership.

LOSAC also filed protests at the Commission against a number of mileage allowance caps filed by individual railroads. One such case, Docket No. 39908, *Mileage Allowances For Covered Hoppers, Grain & Grain Products, BN* (not

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1 This standard of compensation is known as cost of ownership, as that phrase is defined in §11122(b).

printed), served December 5, 1985, resulted in an order requiring the Burlington Northern Railroad to cancel a tariff capping allowances at 10 cents, far below levels reflecting cost of ownership. This, however, did not solve the problem because the Commission permitted allowances of 15 and 18 cents per mile, themselves still far below cost of ownership, to retake effect. LOSAC appealed that decision to the United States Court of Appeals for the D.C. Circuit, seeking a definitive ruling on the meaning and effect of §11122(b). The court, in *LO Shippers Action Committee v. Interstate Commerce Commission*, 808 F.2d 64 (D.C. Cir. 1986), held that LOSAC, having won the case, lacked standing to appeal. The court noted in its decision (Id. at 66) that –

> the "cost of ownership" question that LOSAC seeks to litigate here is currently before the Commission in what has been described as an "industry-wide" proceeding. We will not preempt an appropriate administrative determination on that issue by deciding this case.[2]

Because LOSAC regarded the statutory construction issue as the crucial issue in all the controversies over allowances, it also sought to obtain from a federal district court a declaratory order construing the meaning and effect of §11122(b). On April 6, 1984, LOSAC filed suit in the U.S. District Court for the Northern District of Illinois, Eastern Division, naming the individual commissioners of the Interstate Commerce Commission and the Association of American Railroads as defendants and seeking a declaratory order construing §11122(b). In a Report and Recommenda-

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2 The "industry-wide" proceeding referred to was ICC Docket No. 39117, the case here involved.

tion by Magistrate Lefkow (*LO Shippers Action Committee v. Reese H. Taylor, Jr., Et Al.*, No. 84 C 3034, slip op. (N.D. Ill. E.D. Sept. 3, 1986)), the magistrate recommended dismissal on grounds of primary jurisdiction in the ICC, particularly in view of the pendency of LOSAC's complaint case (Dkt. No. 39117) at the Commission. Since, by that time, LOSAC's complaint case at the ICC had already been briefed, LOSAC voluntarily dismissed its declaratory judgment action.

LOSAC's complaint case (Appendix B) at the Commission was decided on two grounds. First, the Commission held that, under §11122(a), it has discretion whether or not to prescribe allowances at all, and on that basis, declined to prescribe covered hopper allowances for the future. Appendix B at 14-18. Second, it held that §11122(b) does not require allowances to be based on cost of ownership, saying (Id. at 21):

> Under prevailing market conditions, reductions below full cost-of-ownership allowance levels have been justified by considerations of excessive fleet size and the need to maximize car use. In fact, the record in this case shows that *allowing market based car hire returns*, instead of prescribing fixed returns, *best accommodates the various factors we are required by the statute to consider*. (Emphasis added.)

The court of appeals affirmed both of the Commission's main holdings. First, the court placed full reliance on the word "may" in §11122(a) and held (Appendix A at 10) that –

> [T]he Commission's determination that it was not required to prescribe compensation levels was

within its statutory discretion, and we will not disturb that determination.

On the fundamental issue in the case – the interrelationship between the first and second sentences of §11122(b), and the consequent meaning and effect of that section as regards a private car compensation standard – the court deferred to the Commission's construction of §11122(b), approving it without any real scrutiny. The court, like the Commission before it, did not give any consideration to the governing legislative history or the predecessor versions of §11122(b), from 1966, when the cost of ownership standard was first written into the Act, or from 1976, when the standard was strengthened and expanded. It relied solely on the wording of the 1978 "revised" version of the statute. Nor did the court even acknowledge arguments by LOSAC showing that, in 1980, when the Staggers Act was enacted, Congress expressly rejected legislative proposals for market-based private car compensation.

REASONS FOR GRANTING THE WRIT

I. THE CONSTRUCTION OF §11122(a) AND (b) INVOLVES IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

In the decision under review, the United States Court of Appeals for the District of Columbia Circuit affirmed a decision of the Interstate Commerce Commission which fundamentally affected the long-established standard of compensation for private parties – shippers and other private car owners – who supply cars for railroad use, chang-

ing the standard from that of the car owner's cost of owning and maintaining the car to one set wholly by market forces, without regard to cost of ownership. The decision – in a case which the participants all conceded had industry-wide significance – will have enormous impact on the supply of cars available to the nation's railroads. In the short term, it will mean that hundreds of private car owners will be undercompensated each year for their investment in rail equipment to the extent of hundreds of millions of dollars. In the long term, it will mean that private investment in rail cars will dwindle and that severe rail car shortages – of the sort that first drove Congress in the mid-1960's to specifically legislate the cost-of-ownership standard for car compensation – will once again plague our nation. Large-scale rail car shortages affect everyone. Rail car shortages hamper efforts of American farmers, manufacturers and merchants to promptly and efficiently transport basic materials and finished products, with resultant harmful effects on our domestic economy and upon our ability to export goods, to compete in world markets and to reverse our nation's trade deficit. Equally serious, rail car shortages dangerously reduce our defense-readiness.

The basic issue raised by these proceedings is, what is the standard for private rail car compensation under §11122(b) of the Act? Since the very beginning of the railroads' use of private rail cars in this country to fulfill their common carrier obligation, that standard has been "cost of ownership." *Mileage Allowances on Refrigerator Cars*, 218 I.C.C. 359, 364 (1936); *Dixie Carriers, Inc., Rates And Allowances*, 278 I.C.C., 417, 423 (1950); *Tank Car Allowances In Official Territory*, 313 I.C.C. 435, 438 (1961). In the decision here under review, the Commission, with the Court of Appeals' approval, has

abandoned the cost-of-ownership standard for car compensation in favor of market-based compensation.[3]

This has serious ramifications for the national interest. The Commission has itself recently recognized that "[f]reight car shortages have been the rule, and car surpluses the exception, for much of the history of railroading in the United States." *Investigation Of Adequacy Of Freight Car Ownership*, 1 I.C.C. 2d 700, 703 (1985). Moreover, the Commission acknowledges that "[h]istory teaches that car shortages are far more common than car surpluses, and we cannot properly allow periodic swinges in equipment availability to dictate the answers to long-range policy questions." Id. at 712. Nonetheless, the Commission has allowed the now-ending car shortage to dictate a fundamental change in the law of car compensation which will have gravely adverse long-range consequences for the nation's rail car supply. Since the same compensation standard applies equally to all private cars, the effect of the Commission's decision in *LOSAC* is to usher in market-based compensation for all private cars. This change is clearly contrary to the intent of Congress set forth in the statute.

The burgeoning reliance of the railroads upon private cars is unmistakable. Since 1929, private ownership of rail cars has grown from 13 to 37 percent of the total national fleet. A disproportionately large share of cars – most notably, covered hoppers and tank cars – used for carrying bulk

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3 Actually, "market-based compensation" is a misnomer. The railroads control the market. They control the tariff-publication mechanism and they have complete control over access to the market. No private cars may be used without railroad approval. Thus, "market-based compensation," as used by the ICC, means allowances unilaterally imposed by the railroads.

materials is in private ownership. As previously noted, 45 percent of the covered hopper fleet is private and 99 percent of the tank car fleet is private. AAR, *Railroad Facts* (1988 ed.) 47. The obvious inference is that the railroads are not investing in sufficient equipment to meet the national needs and that they are increasingly reliant on private equipment to fulfill their common carrier obligation.[4]

It is questionable transportation policy, to say the least, for the Commission to sanction in below-cost allowances, at a time when railroad reliance upon private cars is greater than ever. The Commission has repeatedly recognized that allowances which are below the cost-of-ownership level are a "disincentive to the purchase of cars" and, hence, are contrary to the congressional purpose underlying §11122. *See Car Service Compensation – Basic Per Diem Charges*, 361 I.C.C. 189, 191 (1979), aff'd in part, rev'd in part on other grounds *Consolidated Rail Corp. v. United States*, 619 F.2d 988 (3d Cir. 1980); *Car Service Compensation – Basic Per Diem Charges*, 358 I.C.C. 716, 737 and 738 (1977).

If market-based allowances force a reduction in private investment in rail cars, the inevitable effect will be severe rail car shortages. The cost of replacing the private rail car fleet would be too high for the railroads to bear alone and the nation would again face severe car shortages of the sort which led to remedial federal legislation in 1966 and 1976.[5]

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4 In the *LOSAC* decision, the Commission observed that the covered hopper car surplus had decreased and spot shortages were occurring in the west. Appendix B at 11, n. 17.

5 Assuming the average replacement cost of a covered hopper car to be $40,000, it would cost over five billion dollars just to replace the private covered hopper fleet, to say nothing of other car types.

This case clearly presents a legal issue of widespread effect and great importance as to the meaning and effect of §11122(b). The Court below simply deferred to the ICC's interpretation of its own powers. The Court conducted no meaningful review of the issues, never referred to the statute "replaced" by the "revised" version, and never referred to the legislative history cited to it by petitioner, which clearly showed that Congress has specifically provided that allowances shall be based on costs of ownership and that the ICC is not authorized to vary that standard.

There are no other cases of such industry-wide significance pending or likely to occur wherein the issue is so clearly presented. The issue needs to be definitively decided by this Court, given the national importance of the matter as well as the adverse consequences that would result if the Court of Appeals' decision is let stand.

II. THE DECISION OF THE COURT OF APPEALS IS PATENTLY ERRONEOUS

A. There Is No Way §11122(b) Can Be Construed To Require Shippers To Accept Allowances Below Cost of Ownership, Even In Times Of A Car Surplus.

While the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), may not always be easy to apply, they certainly are in this case. Simply following those principles leads inevitably to the conclusion that Congress has spoken clearly and unambiguously to the precise issue involved and has said in no uncertain terms that the floor for private car allowances shall be the basic costs of ownership, whether there is a car shortage, car surplus or merely an adequate car supply. Owners are to be

"compensated" at all times for furnishing private cars. Furthermore, the ordinary rules of statutory construction, from which the Court of Appeals departed, are "especially forceful" where Congress itself has defined the specific standard to be used. *American Min. Congress v. U.S. E.P.A.*, 824 F.2d 1177, 1183 (D.C. Cir. 1987).

And in this case, a special rule of statutory construction applies. Congress itself has said that a provision of the 1978 revised Interstate Commerce Act cannot be construed as making a "substantive" change in the meaning of a "replaced" provision. (Appendix C at 5) When a question of Congressional intent is at issue, as it is here, reference must be made to the statute "replaced" to determine that intent. The court cannot determine Congress' intent from the revisers' language alone. Two courts have specifically recognized the necessity of reviewing pre-1978-revision versions of the Interstate Commerce Act to determine congressional intent for enactments made before 1978. See *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980); *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979). Also, as the Second Circuit has held, and as common sense itself would dictate, a particularly important aid to statutory construction is the wording of prior versions of the statute. *Israel-British Bank (London) Ltd. v. Fed. Dep. Ins. Corp.*, 536 F.2d 509, 512 (2d Cir. 1976), cert. den., 429 U.S. 978.

Obviously, a statute which plainly states, "[t]he rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car," is not silent on how the rate of compensation is to be determined. The Court of Appeals purported to find (Appendix A at 12) some "gap" between the first and

second sentences of §11122(b) based solely on a superficial reading of §11122(b) as it appears in the codifiers' "revised" version, but there is no such gap in the statue as actually enacted by Congress.

The statutory provisions on which this case turns were originally enacted in 1966. Infra at 14; Appendix C at 1-2; Appendix D at 3-4. After directing the ICC to give consideration to "the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply," Congress further directed that the ICC —

> . . . shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by [an] incentive element or elements . . . (Emphasis added)

That language means just what it says. The 1976 amendments contained the same provisions with the addition of a specific statement of Congressional policy which tied it all together. See Appendix C at 3-4. There is simply no way this language can be interpreted as the Court below interpreted the "revised" language.

A statutory provision cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent. *United States v. Champlin Refining Co.*, 341 U.S. 290 (1951). Rather, the meaning of the statute should be considered in the light of the national conditions existing at the time and from which

the statute emerged. *The Pietro Campanella*, 73 F. Supp. 18, 26 (S.D. Tex. 1947).

The Court of Appeals, and the Commission before it, gave no consideration to the legislative history of §11122(b) as originally enacted in 1966.[6] This omission led to construction of the statute in a factual void. The original predecessor of §11122(b) was enacted in 1966 "to secure alleviation of the recurring national shortages of railroad freight cars."[7] That congressional purpose has been recognized repeatedly by the Commission and the courts. See *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 992 (3rd Cir. 1980); *Car Service Compensation – Basic Per Diem Charges*, 358 I.C.C. 716, 721 (1977); *Long Island R. Co. v. United States*, 318 F. Supp. 490, 492 (E.D.N.Y. 1970); *Union Pacific R. Co. v. United States*, 300 F. Supp. 318, 325 (D. Neb. 1969), aff'd, 396 U.S. 27, reh. denied, 396 U.S. 1030 (1969).

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6 Neither the ICC nor the Court of Appeals even referred to any of the legislative history referred to in this petition. In fact, neither the ICC nor the Court even acknowledged that LOSAC had strongly argued this point.

7 H.R. Rep No. 1183, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2228. This is not to say that §1(14)(a) first appeared in 1966, or that there was no car compensation provision in the Act prior to 1966. Although the earliest car compensation statute came into being in 1917, and was amended in 1920, 1935 and 1940, these first four versions did not contain any reference to a standard of car compensation. That first appeared in 1966.

The manner in which Congress effected the purpose of the statute in the 1966 amendment was to put the cost-of-ownership standard in the statute and then, in addition, to expressly empower the Commission to raise rates of car compensation above cost of ownership, including a fair return on value, through imposition of an incentive element in order to encourage acquisition of specific car types.[8]

The legislative history of the 1966 amendment leaves no doubt that cost of ownership was the minimum permissible car compensation; it was a starting point. In a letter reproduced in the House report accompanying the 1966 amendments, the Acting Chairman of the ICC Committee on Legislation conveyed the Commission's strong support of the measure and stated that the proposed statute would make clear "that the Commission has authority to establish per diem charges above the bare cost of ownership and at a

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8 The immediate administrative background for the amendment of §1(14)(a) was that, in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, decided July 25, 1947, the Commission established an incentive per diem charge for railroad-owned cars other than tank and refrigerator cars to be applicable for six months to "promote greater efficiency in the use and increase the supply of cars." (Id. at 674) That order was set aside in *Palmer v. United States*, 75 F. Supp. 63, 75 (D. D.C. 1947) on grounds that "the statutory authority to fix reasonable compensation for the use of cars does not empower the Commission to establish, solely for general car-service regulatory purposes, rentals in excess of any purported reasonable recompense to the owner." The amendment to section 1(14)(a) was Congress' response to the judicially-imposed restriction on the Commission's power to fix car compensation above cost of ownership. 112 Cong. Rec. H10439, daily ed. May 12, 1966 (Comments of Congressman Brock Adams, member of the Interstate and Foreign Commerce Committee).

level that would make the advantages of owning equipment more attractive."[9] (Emphasis added)

Numerous statements of legislators during the floor debates for the 1966 amendments dealing with car compensation demonstrate that "barebone cost of ownership" was the floor for car compensation:[10]

The Staggers Act repealed subsection 11122(b)(2) and eliminated the (1) from §11122(b)(1), but it left the text of §11122(b)(1) unchanged as §11122(b). While the legislative history of that statutory change is meager, the Congressional debates make it clear that repeal of §11122(b)(2) was not intended to change existing law requiring allowances to be based on cost of ownership because, under §11122(b), formerly §11122(b)(1), the Commission still retained the power to accomplish, by giving consideration to current costs of capital, what it formerly could accomplish by including an incentive element in basic car hire rates.[11]

In the final debate immediately before passage of the Staggers Act in the Senate, the Chairman of the Committee on

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9 H.R. Rep. No. 1183 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News at 2232 (letter from John W. Bush to Hon. Oren Harris, September 2, 1965).

10 See S. Rep. No. 386, 89th Cong. 1st Sess. 7-8 (June 30, 1965); H.R. Rep. No. 1183, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2230; 112 Cong. Rec. H10433 (daily ed. May 12, 1966) (statement of Rep. Anderson); 112 Cong. Rec. H10434 (daily ed. May 12, 1966) (statement of Rep. Staggers); 112 Cong. Rec. H10437 (daily ed. May 12, 1966) (statement of Rep. Springer).

11 Also, the Conference Committee Report on the Staggers Act plainly states that "the rental rate for . . . rolling stock should be sufficient to pay an adequate return on investment." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 117 (1980); 126 Cong. Rec. (daily ed. Sept. 29, 1980) H9925.

Interstate and Foreign Commerce, Senator Cannon, said (126 Cong. Rec. S14002 (daily ed. Sept. 30, 1980)):

> Some concern has also been expressed about the bill's car compensation provision. The Conference substitute repeals the specific authority of the Commission to impose what has been known as incentive per diem, that is, an additional incentive element of compensation beyond basic freight car rental charges. On this matter, I wish to make it clear that, in agreeing to elimination of the Commission's authority to impose incentive per diem, the conferees were cognizant of the continued power of the Commission under 49 U.S.C. 11122 to increase basic freight car rental rates to levels high enough to attract new and additional investment into the railroad industry as necessary to assure a national freight car supply adequate to meet the needs of commerce and the national defense. (Emphasis added)

Senator Kassebaum, the minority floor manager of the Staggers Act, echoed those words (Id. at S14011):

> With regard to incentive per diem rates, I want to heartily endorse the chairman's comments on this section, that is, that the repeal of the specific incentive per diem rate authority of the Commission was agreed to in recognition of the fact that continuing authority under section 11122 of the act will serve to preserve necessary flexibility to the Commission in addressing car shortages. (Emphasis added)

Significantly, although Congress has twice amended the 1966 provisions of §1(14)(a), not counting the 1978 revision, it never swerved from its original purpose of maintaining an adequate supply of freight cars and avoiding freight car shortages. Proof of this lies in the fact that throughout all

subsequent changes to §1(14)(a), Congress has retained the statement of purpose which first appeared therein in 1966 that Congress intended to encourage the purchase, acquisition and efficient use of freight cars. That statement of purpose, such as it is after the 1978 revision, now appears in the language of the revisers in §11122(a).[12]

Nowhere in the Statute itself or anywhere in its legislative history is there any indication that Congress ever intended to punish owners or lessees of existing private cars that had been acquired during periods of car shortages by reducing their compensation below costs of ownership during a car surplus. Such a thought would have been abhorrent to Congress. If there had been the lightest indication that such could happen, the whole purpose of requiring adequate or incentive compensation would have been frustrated because no one would have acquired cars with any such possibility hanging over his head.

It is an elementary principal of statutory construction that the words of a statute must be interpreted in light of the purpose Congress sought to serve. *Atchison, T. & S.F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980). A statute should not be interpreted in a manner which would subvert its underlying purpose. *Porter v. Prudential Insurance Co. of America*, 470 F. Supp. 203, 206 (W.D. Tex. 1979). Rather, a statute should always be construed in a manner which effectuates rather than frustrates the major purpose of the legis-

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12 The 1978 revision was supposed to be nothing more than recodification without substantive change. Act of October 17, 1978, §3(a), Pub. L. No. 95-473, 92 Stat. 1337 (1978). See *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980). It was at this time that the section number changed from 1(14)(a) to 11122.

lative draftsmen. *Aranda v. Pena*, 413 F. Supp. 849, 850 (S.D. Fla. 1976).

The only construction of §11122(b) that effectuates the purpose of the car compensation provision is one that preserves cost of ownership as the minimum for car compensation. Only such an interpretation will ensure the necessary investment in equipment to guarantee a continuing adequate car supply.[13]

In the deliberations which led to the Staggers Act, the railroads, the Department of Transportation and even the Commission urged Congress to adopt a market-based system for car compensation and Congress specifically rejected that concept, a fact never referred to by either the ICC or the Court of Appeals. This is strong evidence of the error of the Court of Appeals in affirming the Commission's decision to sanction market-based car compensation.

The legislative history of the Staggers Act shows that early drafts of the legislation which became the Staggers Act contained provisions mandating that the marketplace set private car allowances. The earliest version of the Staggers Rail Act was S. 796, proposed by the Carter Administration in 1979. Section 140 of S. 796 would have repealed §11122 entirely and would have also required carriers to individually

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13 Manufacturing rail cars is not like manufacturing paper clips or some other product that can be churned out rapidly on demand. LOSAC submitted evidence to the Commission showing that during past times of heavy demand for cars, manufacturing lead times ran to 1-1/2 to 2 years. C.V.S. 15, p. 5.

negotiate car compensation with each shipper; failing such agreement, the governing car compensation would have been whatever the carriers had jointly established as the "uniform industry wide rates and provisions" for car compensation as between carriers. [14] Transportation Secretary Brock Adams explained that "we simply cannot any longer look to the government to decide . . . what shippers or other railroads should pay for those cars.[15]

A subsequent version of the bill, S. 1946, preserved the cost-of-ownership car-compensation provision of the Act and changed only the Commission's emergency car service powers. See section 301, S. 1946, *Hearings on S. 1946 before the Committee on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 41-42 (November 9, 1979).

This revision brought a strong negative reaction from the Association of American Railroads which, through its president, William H. Dempsey, submitted the following written testimony to the committee:

> The railroads are convinced that car service and compensation matters should cease to be the subject of Federal regulation, and that disputes with respect thereto should be resolved by private arbitration. We realize that this is a radical departure from the status quo and raises uncertainties of concern to shippers, private car owners, car leasing companies and others. We understand, therefore – though we do not agree with – the Committee's considerably narrower approach which is to deal

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14 *Hearings on S. 796 before the Subcommittee on Surface Transportation, Senate Committee on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 48-49 (April 12, 1979).

15 Id. at 73.

> only with the emergency car service powers of the Commission. At the very least, we would urge that the car service and compensation function be made the subject of an in-depth study by the Commission and/or the Department of Transportation as the feasibility and desirability of deregulation.[16]

The earlier car-compensation provision of S. 796 (section 140, deregulating mileage allowances) was revived in another subsequent Administration-backed version of the bill, H.R. 4570 (section 141), but then was removed from the bill during its consideration by the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce (see H.R. 4570, House Subcommittee Preliminary Working Draft No. 2). A DOT Assistant Secretary for Policy and International Affairs expressed the Administration's reaction to this change:

> Similarly, a market oriented approach is, as we maintain, the best way to encourage additional investment in equipment as well as its proper allocation among shippers.[17]

The then Chairman of the Commission, Darius W. Gaskins, Jr., provided the House subcommittee with a section by section analysis of Working Draft No. 2 which dealt with the car service compensation provision of that draft by suggesting ". . . that additional flexibility clearly be provided so

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16 *Hearings on S. 1946 before the Committee on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 152 (November 7, 1979).

17 *Hearings on H.R. 4570 before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 3 (March 31, 1980).

that per diem charges could vary according to particular market conditions."[18]

Ultimately, Congress rejected these appeals for market-based car compensation and retained the cost-of-ownership standard, without change.

This action on the part of Congress conclusively shows that Congress considered and rejected a market-oriented approach to car compensation. In retaining the cost of ownership standard without change, Congress cannot be presumed to have added new meaning to old language, particularly when the new meaning is something that Congress considered but expressly rejected. See *Catano v. Local Board No. 94 Selective Service System*, 298 F. Supp. 1183 (E.D. Pa. 1969).

B. The Court of Appeals' Decision Is In Conflict With *General American T. Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940), and Deprives Petitioner of Remedies Guaranteed It By the Interstate Commerce Act.

In *General American T. Car. Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940), this Court said:

> . . . The shipper in this case was permitted by law to furnish freight cars . . . and to be paid a reasonable allowance . . . and . . . the law requires that the amount and conditions of payment of such allowance shall be set forth in a published tariff. If this is not done, the shipper may complain to the Commission, to the end that a proper allowance be

18 Id. at 290.

> ascertained and made effective by a schedule duly published. (Emphasis added)

This is exactly what LOSAC did after fruitless efforts to negotiate reasonable allowances with the railroads. There is no hint in *El Dorado* that, once a shipper petitions the ICC for a reasonable allowance, the ICC has discretion to regulate or not regulate car compensation as it sees fit. Plainly, §11122(a) simply confers on the ICC the specific power to prescribe allowances[19]; §11122(b) is the standard for exercise of that power. As the ICC itself said in *Mileage Allowances on Refrigerator Cars*, 218 I.C.C. 359, 364 (1936):

> The authority to prescribe the compensation to be paid by a railroad to a car owner for the use of a car owned by the latter carries with it the obligation to determine such compensation in an amount that will be reasonable to the owner.

Obviously, it could not logically be otherwise. It simply makes no sense to say that §11122(b) sets up a legal standard for allowances for private equipment which the ICC or the courts can choose to enforce or not enforce as they see fit. Section 11122(a) cannot be read as conferring that kind of unchecked discretion on the ICC. This Court did not think so in 1940 and today there is a much more specific legislative standard to enforce.

The Commission has no "option" to grant or deny relief to a litigant simply as a matter of its own "untrammeled discretion." *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d

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19 At the time *El Dorado* was decided, §1(14) read substantially as §11122(a) does now. The ICC had already held that compensation for private cars should be based on the cost of ownership, although that standard was not specifically written into the Act until 1966.

1186, 1196 (D.C. Cir. 1985). That the Commission has the duty to enforce the Act is unquestioned. The Commission must act within the ambit of its statutory authority. It must also discharge the duties placed upon it by statute. Section 10321(a) of the Act provides that the Commission "shall carry out" the provisions of the Interstate Commerce Act, of which §11122(b) is a part.[20] Section 10701(b) of the Act entitles a person to file a complaint with the Commission about a violation of the Act. Section 11705(c)(1) of the Act grants to a person the right to file a complaint seeking to enforce the liability of a carrier to that person. And §11122(b) sets up the standard to be used in judging the lawfulness of allowances.

"Shall" is the language of command. *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186, 1191 (D.C. Cir. 1985). When Congress commands, the Commission must listen and act in accordance with the command. It is the duty of the courts "to determine whether the course followed by the Commission is consistent with its mandate from Congress." *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973). *Farmers Union Cent. Exch. Inc. v. F.E.R.C.*, 734 F.2d 1486, 1500 (D.C. Cir. 1984). That the Commission does not like the law and prefers allegedly market-based allowances to cost-based allowances is irrelevant. When Congress itself prescribes the standard to be followed the Commission may neither re-write it nor ignore it. *United States v. Carolina Freight Carriers*, 315 U.S. 475, 489 (1942). "It is not the Courts' role . . . to overturn congressional assumptions embedded into the framework of regulation es-

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20 In §12(1), the statute replaced by §10321(a), the ICC was required "to execute and enforce" the provisions of the Act.

tablished by [an] Act." *F.P.C. v. Texaco*, 417 U.S. 380, 400 (1974). Nor is it the Commission's.

C. The Court Of Appeals' Decision Effects De Facto Deregulation Of Covered Hopper Car Allowances, In Violation Of 49 U.S.C. §10505(a)

The Court of Appeals' decision allows market-based compensation to be substituted for cost-based compensation on covered hopper cars.[21] Devoid of the cost-of-ownership framework, and interpreted the way the Commission and the Court of Appeals ruled, §11122(b) contains no standard for car compensation. The practical effect is to exempt covered hopper car allowances from regulation because it takes the meaning out of "reasonableness" as regards allowances. After all, how can any allowance dictated by the market place be unreasonable? This is de facto deregulation of car allowances.

If the objective of the ICC in the proceedings below was to deregulate allowances, as it obviously was, in order properly to have done so, the Commission would have had to follow the procedures prescribed in §10505 and would have had to find that regulation –

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
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> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

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21 As stated earlier herein (fn. 3, supra, at 8), the term "market-based allowances" is a misnomer, since the railroads control the market.

The Commission never openly treated this as an exemption, or deregulation, matter. Although LOSAC argued before the Commission that, to allow the railroads to set allowances based solely on supply and demand would constitute de facto deregulation of covered hopper car allowances, the Commission never responded to that argument or made any of the findings required of, an exemption petition. The Court of Appeals, similarly, ignored that issue. Accordingly, the Court of Appeals' decision is in error for sanctioning unlawful deregulation of covered hopper car allowances.

CONCLUSION

For the reasons set forth above this Court should issue a Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit to review its judgment in this case.

Respectfully submitted,

HAROLD E. SPENCER
STEPHEN C. HERMAN
BELNAP, SPENCER, MCFARLAND,
EMRICH & HERMAN
20 North Wacker Drive, #3710
Chicago, IL 60606
(312) 236-0204
Attorneys for Petitioner

DATED: February 16, 1989

APPENDIX A

LO SHIPPERS ACTION COMMITTEE, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, and the United States of America, Respondents,

U.S. Clay Producers Traffic Association, Inc., Association of American Railroads, et al., Intervenors.

No. 87-1486.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 28, 1988.

Decided Sept. 23, 1988.

Railroad shippers petitioned for review of Interstate Commerce Commission order declining to regulate railroads' payment of allowances to shippers using their own railroad cars. The Court of Appeals, Sentelle, Circuit Judge, held that Interstate Commerce Commission's refusal to regulate railroad allowances provided to shippers for use of their own railroad cars, thus permitting railroads to pay below-cost compensation to car-providing shippers, was reasonable interpretation of statute authorizing Commission to regulate railroads in order to encourage purchase, acquisition and efficient use of freight cars.

Petition denied.

1. Commerce 160

Court would review Interstate Commerce Commission's published decision rather than transcript of publicly conducted conference, though commissioners voted same way at conference as they did in subsequently published decision,

in that commissioners retained full authority to approve, disapprove, or modify decision until it was published.

2. Commerce 85.8

Interstate Commerce Commission had discretion determining whether to issue regulations providing industry-wide terms for use of nonrailroad-owned equipment. 49 U.S.C.A. §11122(a).

3. Commerce 85.12

Interstate Commerce Commission's refusal to regulate railroad allowances provided to shippers for use of their own railroad cars, thus permitting railroads to pay below-cost compensation to car-providing shippers, was reasonable interpretation of statute authorizing Commission to regulate railroads in order to encourage purchase, acquisition and efficient use of freight cars. 49 U.S.C.A. §11122(a, b).

Petition for Review of An Order of the Interstate Commerce Commission.

Harold E. Spencer, with whom Stephen C. Herman, Chicago, Ill., was on the brief, for petitioner.

Louis Mackall V, Attorney, I.C.C., with whom Robert S. Burke, Gen. Counsel, and Henri F. Rush, Deputy Gen. Counsel, I.C.C., and John J. Powers, III and John P. Fonte, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

J. Michael Hemmer, with whom Paul R. Duke, Robert D. Fram, Elizabeth V. Foote, John B. Norton, J. Thomas Tidd, Washington, D.C., John S. Walker, Denver, Colo., Dennis W. Wilson, William R. Power, Robert T. Opal, Chicago, IL., Emried D. Cole, Jr., Paul R. Hitchcock, Paul A. Cunnin-

gham, Richard B. Herzog, Robert G. Shepherd, Jr., Washington, D.C., Michael Roper, Louis P. Warchot, San Francisco, Cal., and Mark A. Kalafut, Omaha, Neb., were on the joint brief, for intervenors The Association of American Railroads, et al. J. Stephen Lawrence, Jr., Washington, D.C., also entered an appearance for intervenors, Ass'n of American Railroads, et al.

Henry M. Wick, Jr., Pittsburgh, Pa., was on the brief for intervenor U.S. Clay Producers Traffic Ass'n, Inc.

Mark L. Evans and James P. Tuite, Washington, D.C., entered appearances for amicus curiae, BRAE Corp. and Itel Rail Corp.

Before MIKVA and SENTELLE, Circuit Judges, and PALMIERI,* Senior District Judge.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

LO Shippers Action Committee ("LOSAC") brought a complaint before the Interstate Commerce Commission ("ICC" or "the Commission") against several railroads alleging that the allowances provided to LOSAC's shipper/members for the use of their own railroad cars were inadequate as a matter of law and seeking the establishment of Commission-ordered allowance structures. The ICC dismissed the complaint. LOSAC now petitions this Court for review of that ICC decision. Finding no error, we affirm the agency's dismissal and deny petitioner's request for relief.

* Of the United States District Court for the Southern District of New York, sitting by designation.

I. BACKGROUND

A. *General*

Railroads, as common carriers, generally furnish the cars and equipment necessary to perform the transportation services provided under their tariffs. However, under some circumstances, a shipper provides its own (or a leased) railroad car or a railroad makes use of a car belonging to another carrier. In those cases, the railroad provides compensation to its shipper through "allowances" on a mileage basis or to the other line through "per diem." This practice is addressed by 49 U.S.C. §11122 (1982), which provides:

> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –
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> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and
>
> (3) sanctions for nonobservance.
>
> (b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type

of freight car, and other factors that affect the adequacy of the national freight car supply.

LOSAC is an association of shippers using and providing covered hopper cars commonly known in the railroad industry as "LO cars." LO cars are used in virtually all rail movement of grain, grain products, fertilizers, and many chemical products. These cars in common with refrigerator cars, tank cars, and a few other private cars, are frequently furnished by shippers triggering the use of allowance compensation. Allowances are published as tariffs. *Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466, 476 (1967). Since at least the 1960's, these rates have been the subject of continuing dispute between the railroads on the one hand and the LO shippers on the other. LOSAC, formed in 1970, has functioned as the speaking mechanism of the shippers in the continuing dispute. In 1980, LOSAC reached an agreement with the railroads as to the structure and payment of such allowances. The 1980 agreement reflected national average costs of ownership. All parties operated under the agreement until May 24, 1982, when the railroads notified LOSAC of their intention to terminate the agreement and cease periodic updates which it had provided.[1] In February of 1983, LOSAC filed a formal complaint with the ICC against 252 railroads charging that the railroads' allowances were below applicable costs of owning and maintaining LO cars and, LOSAC contends, in violation of subsection 11122(b). LOSAC's complaint sought a determination that

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1 LOSAC did not try to enforce the agreement *qua* contract. Count 1 of the complaint alleged that the railroads' failure to make the agreed updates to the previously-agreed allowances constituted an unjust and unreasonable practice "and results" in unlawful allowances. Joint Appendix 52-53. The ICC stated in its opinion that lawfulness of the railroads' allowances under subsection 11122(b), not adherence to the 1980 agreement, was the issue in the case and LOSAC agrees. *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry. Co.*, 4 I.C.C.2d 1, 3 (1987); *see* Brief for Petitioner at 36. Accordingly, we have no issue before us regarding the 1980 agreement as such.

the present allowance structure violates that subsection and asked the ICC to require the railroads to pay future allowances consistent with the standards of subsection 11122(b) as well as damages for past allowances below that standard.

The railroads answered that subsection 11122(a) does not require the ICC to regulate allowances, and, if the ICC does regulate allowances, the statutes taken as a whole provide for the payment of below cost, market-based allowances in appropriate circumstances. The ICC heard oral argument in December of 1986 and held public deliberations February 24, 1987, at which a majority of the commissioners accepted the arguments of the railroads and voted to deny relief to LOSAC. On August 31, 1987, the Commission issued its written decision denying relief. *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry. Co.*, 4 I.C.C.2d 1 (1987). LOSAC then filed this petition for review.

B. *The ICC Decision*

After reviewing the parties' positions, the ICC described the consequences of the relief LOSAC sought: (1) huge damage claims with "serious" financial consequences for the railroads and (2) a loss of congressionally granted flexibility for the railroads in setting their rates for transportation in railroad-owned cars at levels competitive with other means of transportation. This latter effect followed, per the ICC, from the necessary combined effect of higher allowances to private-car shippers and anti-price discrimination requirements. The Staggers Rail Act of 1980, Pub.L. No. 96-448, §201(a), 94 Stat. 1898, 1899 (1980) (codified at 49 U.S.C. §10701a(c) (1982)) ("Staggers Act"), had given the railroads flexibility to reduce their rates to cover only their variable costs in depressed markets; the ICC viewed it as anomalous to permit railroads to have rate flexibility to compete in competitive markets and simultaneously to require that they pay

higher, "inflexible"[2] cost based allowances that make attainment of the first goal impossible. 4 I.C.C.2d at 9.

The ICC concluded that LOSAC's interpretation of the statute as requiring that it prescribe fully compensatory allowances is "simply wrong." *Id.* It read subsection 11122(a) as giving it discretion to regulate the subject, noting that it had never before prescribed allowances for LO cars "even in the heyday of regulation." *Id.* Second, the ICC determined that it must consider factors referenced in the second sentence of subsection (b) as well as the cost factors mentioned in the first sentence. The ICC viewed the legislative history as clear that subsection (b), considered as a whole, permits below-cost allowances.

The ICC next considered "whether the goals of the statute can best be served by allowing individual carriers to continue to publish allowances or by prescribing allowances for the entire industry." *Id.* at 11. The Commission found no need to prescribe industry-wide allowances, especially in light of the Staggers Act preference for individual over collective ratemaking, and saw the congressional purpose behind section 11122 as encouraging an *appropriate* supply of cars. *Id.* at 12. The ICC reasoned that granting LOSAC's requested relief was not required to ensure an adequate supply because the present supply of LO cars is more than adequate and was principally acquired when allowances were lower and were not periodically updated. *Id.* at 12-13. Moreover, the ICC reasoned that an increase in allowances would be inconsistent with the "efficient use," 49 U.S.C. §11122(a), of cars that the ICC is statutorily required to encourage since the rate increases occasioned thereby would cause railroads to lose

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2 LOSAC objects to the ICC's "inflexible" characterization, pointing out its submission of a variable formula. The ICC's usage, however, seems simply to emphasize that LOSAC's construction of the statute imposes an absolute floor on allowances of full-cost recovery, regardless of how sophisticated the formulas by which the level of that floor is determined.

traffic to other means of transportation aggravating the surplus of idle cars. 4 I.C.C.2d at 13. The Commission believed the "transportation use," 49 U.S.C. §11122(b), factor also supported its decision to take no action, since LO cars are used primarily for grain shipments, a highly competitive market, and the ICC believed that the record before it indicated that the allowance caps complained of were not significant outside the grain context. 4 I.C.C.2d at 13. The Commission concluded that the railroads' allowance levels had not been shown to be unlawful under section 11122. 4 I.C.C.2d at 13-14.[3] Finally, the ICC concluded that acceptance of LOSAC's proposed cost-floor standard for allowances was not necessary to protect LO shippers from abuse of market power by railroads. *Id.* at 18-19.

II. ANALYSIS

A. *The Decision for Review.*

[1] While maintaining the inadequacy of the Commission's written decision issued in August, 1987, LOSAC asserts that the decision for our review is in fact the transcript of the February 24, 1987, conference. At that publicly-conducted conference, the same majority of commissioners who later joined fully in the published decision voted to deny relief, and the same two commissioners who later dissented in part voted against the majority on some questions. LOSAC argues that the vote at this public conference was the decision and that we must, therefore, scrutinize the transcript and disregard the subsequent published decision as a *post hoc* rationalization.

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3 In further determinations that have not been brought before us by LOSAC's petition, the ICC rejected LOSAC's charges of unreasonable practices by the railroads and found that it was permissible for a carrier not to pay an allowance but to instead publish separate rate schedules for hauling in railroad- and shipper-furnished cars. 4 I.C.C.2d at 14-18.

This we decline to do. The ICC's formal opinion is its decision because the commissioners retained full authority to approve, disapprove, or modify it until published. LOSAC does not contradict this assertion or contend that the February 24 vote had immediate effect. This is, however, the critical difference between this case and our decision, cited by petitioner, in *Pan American World Airways, Inc. v. CAB*, 684 F.2d 31 (D.C.Cir.1982) (per curiam).

In *Pan Am* the Civil Aeronautics Board ("CAB"), after an unlawfully closed board meeting, issued an emergency order that lacked statutorily required findings of fact. Those followed twelve days later. On review of the order, this Court considered both the subsequently issued findings and a transcript of the preceding board meeting. *Id.* at 36 & n. 12. The majority and dissenter both distinguished the case there from a hypothetical case in which a decision, although made, had not been "*irreversibly made. Id.* at n. 12 (emphasis original); *see also id.* at 51 (Wilkey, J., dissenting). The situation before us now is the *Pan Am* hypothetical, and very closely resembles that in *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191-92 (D.C.Cir. 1983). In *Kansas State*, the FCC had ruled against a party in a published decision. On review, the party submitted a transcript of an open meeting to demonstrate that it was the victim of agency unfairness. We struck the transcript from the record as part of protected pre-decisional processes. While we recognized in that case that *Pan Am* had involved our review of a transcript, we noted that the agency in *Pan Am* had not supplied a contemporaneous statement of reasons necessitating a review of the transcript in order "to dispose of the issue of whether the agency had complied with the Sunshine Act." *Kansas State Network*, 720 F.2d at 192. We further noted that the agency's failure in *Pan Am* to provide a written decision made it impossible for us to assess the reasonableness of the board's action without an examination of the transcript. None of these factors prevails here. Following in the footsteps of *Kansas*

State, we limit our review to reasons given in the ICC's published decision and, absent a compelling indication of error, we must defer to the Commission's interpretation of the statute, with the administration of which it is charged. *Black v. ICC*, 762 F.2d 106, 114-15 (D.C.Cir.1985).

B. *The Commission's Action.*

[2] The Commission ruled, contrary to LOSAC's contention, that it was within its discretion whether or not to issue regulations providing industry-wide terms for the use of non-railroad-owned equipment. LOSAC's contention that the statute *mandates* such regulation is based on the use of the word "shall" in 49 U.S.C. §11122(b). As LOSAC notes, congressional use of "shall" indicates the absence of discretion. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1191 (D.C.Cir.1985). However, LOSAC's argument here takes the word out of its statutory context. Subsection (b) relates not to whether or not industry-wide rates should be regulated but rather to what factors should be, indeed, must be, employed in determining what those rates will be if and when regulated. The relevant portion of the statute in the first instance is subsection (a) which specifies that the "regulations *may* include" the sort of regulations now sought by petitioner. (Emphasis supplied.) Just as the use of the word "shall" indicates the absence of discretion, the use of "may" indicates its presence. *See Matzke v. Block*, 732 F.2d 799, 801 (10th Cir.1984). While we recognize that the context of a particular usage may at times require the construction of "may" as mandatory or "shall" as permissive, no such modifying context is present here. *Cf. United Hosp. Center, Inc. v. Richardson*, 757 F.2d 1445 (4th Cir.1985). Accordingly, the Commission's determination that it is not required to prescribe compensation levels was within its statutory discretion, and we will not disturb that determination.

LOSAC's contention that the interpretation of this statute is for the court and that the ICC construction is not entitled to deference does not change our decision. *Consolidated Rail Corp. v. United States*, 619 F.2d 988 (3d Cir.1980), cited by LOSAC compels no different result than we reach. In that case, the Third Circuit noted quite rightly that the courts and not the agencies are "the final authorities on the proper interpretation of . . . statute[s]." *Id.* at 993 (citations omitted). The Third Circuit was reviewing the ICC's formulation of new rate regulations covering the per diem paid by a car-user line to a car-owning railroad. This involves construction of the predecessor statutes to the one we now construe, the predecessors being substantively the same as the present version. However, the question before the Third Circuit was not whether the Commission was required to regulate, but whether in regulating, it was required to consider all the enumerated factors. The Commission in that case had in fact expressly set the rates on the basis of reviewed cost of capital while expressly not considering the other factors listed in the statute. While that case held that Congress had mandated a consideration of all factors, not a portion, the case simply does not address the same question we face here. Neither does the decision stand for the proposition that the Commission is owed no deference on its interpretation of section 11122 when its decision does, as here, take into account all statutorily enumerated factors.

Neither is *MCI Telecommunications Corp. v. FCC*, 765 F.2ds 1186 (D.C.Cir.1985), cited by petitioner, authority for the proposition that the ICC does not have discretion to prescribe allowances. In *MCI*, the FCC had prohibited non-dominant carriers from filing tariffs, effectively requiring them to enter into individual contracts with customers. The applicable statute expressly provided, however, that "'*[e]very* common carrier . . . *shall* . . . file'" tariffs. *Id.* at 1191 (quoting and emphasizing 47 U.S.C. §203(a) (1982)). The FCC contended that its express statutory authority to "'*modify* any re-

quirement made by . . . this section,'" *id.* (quoting and emphasizing 47 U.S.C. §203(b)(2) (1982)), empowered it to take its action, but we held that the FCC had no authority to prohibit companies from filing tariffs. *Id.* at 1188. In the present case, however, Congress clearly granted the ICC discretion as to the precise subject at issue here. Accordingly, we find that the Commission is due the deference normally owed an agency's interpretation of a statute committed to its care.

[3] LOSAC's argument that the Commission must disapprove market-based allowances which are below cost as computed under the first sentence of subsection 11122(b) likewise compels no disturbance of the Commission's decision. The two sentences of that subsection must be read together. *See Consolidated Rail*, 619 F.2d at 993. The first is directed to the cost factors relied upon by LOSAC; the second to market factors which the Commission found to compel reduction below cost. Each sentence speaks with the imperative "shall." In neither sentence, nor in the two taken together, did Congress provide any conclusive evidence as to the relative weight to be afforded the various factors. It is by now hardly necessary to restate the principle that when Congress explicitly or implicitly leaves "a gap for the agency to fill," the courts will not substitute our own interpretation for that of the agency but will uphold the agency's interpretation provided only that it is a reasonable one. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837-843-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984).

The Commission's interpretation here is more than reasonable. The Commission has previously determined that the statutory factors, considered together, do not require that railroads pay rates of compensation that guarantee full-cost recovery to car-providing shippers. This construction is consistent with the ICC's decision in *Order Granting Railroads Flexibility in Setting Per Diem Levels*, 364

I.C.C. 107, 108-10 (1980), in which the Commission authorized railroads to reduce compensation charges for the use of their cars by other railroads below established inter-railroad "per diem" compensation rates "as a means of discouraging cross-hauling of empty cars . . . and hence as a means of improving car utilization" during a period of car surplus. *Id.* at 108. This decision was referenced with evident approval in the conference committee report to the Staggers Act,[4] H.R.Rep. No 96-1430, 96th Cong., 2d Sess., at 117 (1980), *reprinted in* 1980 U.S.Code Cong. & Admin.News 3978, 4149, with the added suggestion that the Commission permit per diem to rise *above* basic per diem when there is a car shortage. H.R.Rep. No. 96-1430, *supra*, at 118. The conference committee report states an intent that "marketplace decisions govern the railroad industry and its relationship with shippers." *Id.* at 118 (quoted at 4 I.C.C.2d at 11). The legislative history cited by the ICC relates to section 224 of the Staggers Act, which dealt solely with compensation-related matters. *See* Pub.L. No. 96-448, §224, 94 Stat. at 1929-30. The ICC's resort to legislative history adequately supported its construction of the language of the statute. LOSAC's counter-arguments do not compel the conclusion that the ICC erred in its construction, as they must to prevail.

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4 The Staggers Act repealed paragraph 11122(b)(2), which had authorized the Commission to establish an incentive increment to basic compensation when there was an inadequate car supply. Pub.L. No. 96-448, §224(a)(1), 94 Stat. at 1929. The repealed paragraph read in its entirety as follows: The Commission may increase a rate of compensation determined under paragraph (1) of this subsection by an incentive element only when the Commission finds that the supply of a type of freight car is inadequate and an incentive element will compensate freight car owners contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and national defense. The Commission may exempt that incentive element from the compensation to be paid by a carrier or group of carriers when the Commission finds that exemption is in the national interest.Revised Interstate Commerce Act, Pub.L. No. 95-473, §11122(b)(2), 92 Stat. 1337, 1422 (1978) (formerly codified at 49 U.S.C. §11122(b)(2)).

We, therefore, affirm the Commission's construction of subsection 11122(b) as permitting below-cost compensation to car-providing shippers.

Obviously, even given the deference owed the Commission's interpretation, we would not uphold an arbitrary and capricious rejection of LOSAC's complaint against the railroads' allowances. Certainly, the Commission would be required to take appropriate action if the rates were found to be unlawful. However, LOSAC's argument for unlawfulness rests wholly on its interpretation of subsection 11122(b) as requiring full compensation for costs of ownership and as, therefore, requiring all of the annual adjustments provided for under the 1980 agreement. The ICC's rejection of that narrow argument was proper. At some points in its opinion, however, the Commission purports to measure the railroads' allowances against the full range of criteria specified in subsection 11122(b). *See* 4 I.C.C.2d at 11-14. That attempt, as the ICC's vice chairman suggests in his partial dissent, is plainly insufficient. *Id.* at 22. We think the scope of the ICC's decision is correctly assessed in its own Conclusion: "Having rejected the proposition that uniform nationwide allowances should be adopted and must conform to historical ownership costs . . . we have fully disposed of the complaint. LOSAC has made no effort to show that specific allowances are unlawful under any standard that takes into account market conditions as they relate to all of the statutory factors." *Id.* at 19-20. On that basis, we affirm the ICC.

III. CONCLUSION

For the reasons set forth above, we hold that the petition before us is without merit. Therefore, the decision of the Commission will stand and the petition is denied.

APPENDIX B

INTERSTATE COMMERCE COMMISSION REPORTS

NO. 39117

LO SHIPPERS ACTION COMMITTEE

v.

ABERDEEN AND ROCKISH RAILWAY COMPANY, ET AL.

Decided August 12, 1987

Mileage allowances and rate differentials applicable to movements in private covered hopper cars found not shown to be unlawful. Complainant's request for prescription of uniform nationwide allowances on private covered hopper cars denied. Complaint dismissed.

Stephen C. Herman and *Harold E. Spencer* for complainant.

Michael Boudin, Emried D. Cole, Jr., Robert Cowell, Paul A. Cunningham, Christopher T. Curtis, John Doeringer, Paul R. Duke, Elizabeth V. Foote, Stuart F. Gassner, J. Michael Hemmer, Richard B. Herzog, Paul R. Hitchcock, Forrest N. Krutter, J. Stephen Lawrence, Jr., John B. Norton, Robert T. Opal. William R. Power, Michael Roper, Janet Scagnelli, William C. Sippel, John S. Walker, Louis P. Warchot, Dennis W. Wilson, F. Blair Wimbush and *W.J. Wochner* for defendants.

DECISION

BY THE COMMISSION:

The LO Shippers Action Committee (LOSAC or complainant) seeks a determination that the Nation's railroads are failing to publish lawful allowances on private covered hopper cars and requests a prescription of uniform nationwide covered hopper allowances for the future. We conclude that LOSAC has not shown that the railroads, either collectively or individually, have violated the Interstate Commerce Act. Rather, the complaint is based on an incorrect interpretation of the applicable law and it should be dismissed.

I. THE COMPLAINT

LOSAC, a trade association comprised of owners and users of private (non-railroad owned) covered hopper cars, filed its complaint February 24, 1983,[1] asking the Commission to declare unlawful: (1) the railroads' refusal, beginning in 1982, to make yearly collective updates in the levels of allowances published under a 1980 agreement between LOSAC and the Committee on Compensation of the Association of American Railroads (COC); (2) the publication by various individual railroads of rate tariffs with caps on mileage allowances; and (3) the publication by some in-

1 At LOSAC's request, the proceeding was held in abeyance until 1985 pending negotiations. Written evidentiary statements and briefs were then submitted to an Administrative Law Judge. Subsequently, we granted the parties' requests to issue a decision in the first instance by the entire Commission. We heard oral argument on December 2, 1986, and considered the complaint in an open conference on February 24, 1987.

dividual carriers of dual freight rates with allegedly inadequate differentials for rates in private cars below those for movements in carrier-owned cars. LOSAC and its members seek damages for alleged past violations of the act[2] and a prescription of covered hopper car allowances for the future. More than 200 railroads (the railroads or defendants) oppose the complaint.

II. EFFECT OF 1980 AGREEMENT

Before reaching the legal issues raised by LOSAC, we will consider whether the 1980 COC/LOSAC allowance agreement is, in itself, a source of railroad obligations enforceable by the Commmission.

Covered hopper allowances have always been set by the railroads. They have never been prescribed by the Commission.[3] LOSAC began negotiating allowance levels with the railroads in the early 1970's. After a number of interim adjustments, the two sides reached agreement on an allowance formula in 1980, and a general allowance tarrif reflecting the formula was published. In 1982, however, the railroads notified LOSAC that the formula was unsatisfactory under

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2 LOSAC has stipulated that it seeks damages for Count I (refusal to update allowances) only for shipments originating on and after October 1, 1985. It calculates these at $226 million a year. For Count II (mileage caps and differntial rates), it seeks damages for shipments dating back to February 24, 1981. Although not computed, these damages are estimated at $31 million for 1983 alone. Interest on the damages is also sought.

3 The history of changes in allowance levels is shown in the appendix to this decision.

then-current conditions, suspended collective annual updates under the formula, and requested a reopening of negotiations.. Despite negotiations between 1983 and 1985, no further agreement was reached. Since 1983, all new allowance filings have been made by individual carriers.

LOSAC acknowledges that the negotiated formula was not prescribed by the Commission. It states that it decided not to submit the agreement for Commission approval after the Commission declined to grant formal approval of an allowance agreement on other car types in another proceeding.[4] However, it notes that the Commission expressed its support for negotiated settlements in a 1982 decision.[5]

The railroads contend that an unprescribed allowance agreement does not create continuing obligations. They explain that they put the agreed formula into effect in 1980, but made no commitment concerning its duration and made no agreement that future changes would require LOSAC's approval. They further contend that forfeiture of individual

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4 No. 37481, *Shippers Equitable Compensation Action Committee – Petition for Declaratory Order – Agreement on Private Car Compensation (AAR Mechanical Designation RB, RBL and LV)* (not printed), served September 29, 1980 (*SECAC*). In that decision, the Commission stated that, "absent an issue over its lawfulness, we see no need to formally examine the agreement."

5 *Investigation of Tank Car Allowance System*, 367 I.C.C. 48, 50 (1982). The Commission there declined to intervene prematurely in the operation of a *prescribed* formula, but directed the parties to negotiate further.

carrier rights to take independent actions was not part of the agreement.

We find no basis to require collective adherence to an unprescribed formula. The fact that the railroads filed tariffs consistent with an agreed formula for a time does not mean that they had to continue to do so indefinitely. In 1980, we specifically denied a request in *SECAC, supra* note 4, to make a negotiated allowance formula on other car types binding for the future.[6] LOSAC had good reason to conclude that the 1980 covered hopper agreement would be viewed in the same light. When the allowance formula arrived at by the trade associations became unacceptable to the railroads, they refused to continue to use it as a basis for publishing allowances. Thus, the central question in this proceeding is not whether the allowances varied from the "agreed level," but whether they are lawful under the Act.

III. LAWFULNESS UNDER SECTION 11122

A. Contentions of parties. LOSAC argues that 49 U.S.C.§11122 requires that railroads pay allowances calculated to cover at least the cost of car ownership, regardless

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6 In *SECAC*, the Commission rejected an argument that the same situation was presented there as in the case of tank cars, on which the Commission did prescribe a negotiated formula. The Commission explained that the tank car agreement served to resolve longstanding litigation before the Commission and observed that the railroads had agreed to the tank car formula only on the condition that its terms not be made applicable to other types of privately owned cars. *SECAC, supra*, 1. We note also that virtually all tank cars are privately owned, a fact that is significant in view of our discussion below of the practical effects that fixed covered hopper allowances would have on traffic movements in railroad-owned cars. *See* part III B below.

of factual circumstances and their relation to the car hire compensation criteria enumerated in that secion. It places controlling weight on the statement in §11122(b) that:

> The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor.

Because this section provides that the rate of compensation "shall" be determined on the basis of the specified cost elements, LOSAC sees no room for allowances that fall below a cost of ownership level.[7] LOSAC also refers to past Commission decisions in which allowances are described as being related to the cost to the shipper of owning and maintaining the equipment.[8]

In LOSAC's view, the only way to comply with a requirement for cost-based allowances is for the Commission to prescribe a uniform, nationwide allowance formula for covered hopper cars. For the past, LOSAC urges that the 1980 COC/LOSAC formula be taken as the standard of lawfulness for cost-based covered hopper allowances. For the

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7 Although LOSAC recognizes that §11122 also calls for consideration of other factors (discussed below), it argues that these factors can only justify increases in car compensation during car shortages, not decreases below the cost-of-ownership level during car surpluses.

8 *E.g., Tank Car Allowances in Official Territory*, 313 I.C.C. 435, 438 (1961); *Dixie Carriers, Inc., Rates and Allowances*, 278 I.C.C. 417, 423 (1950); *Mileage Allowances on Refrigerator Cars*, 218 I.C.C. 359, 364 (1936).

future, LOSAC seeks prescription of a modified formula that would, among other things, incorporate a high cost of capital. Because LOSAC takes the 1980 negotiated formula as the standard for past allowances under §11122, it contends that the railroads have been violating §11122 in not updating allowance levels yearly through recomputations based on current repair charges, interest rates, and average loaded mileage, as provided in the formula.[9]

LOSAC also identifies 220 specific tariffs on which the allowance payable is subject to specified ceilings or "allowance caps"[10] or on which there are no mileage allowances and, in LOSAC's view, there are inadequate differentials between freight rates for movements in private cars and those for movements in carrier-owned cars. Since these allowance caps and differentials deviate from the allowance levels provided by the 1980 formula, LOSAC considers them to be in violation of §11122.[11]

In reply, the railroads deny that their allowance practices have been shown unlawful in light of the applicable statutory provisions and regulatory policies. First, they argue that the Commission is not required to prescribe car compensation at all; §11122 merely provides that the Commission's regulations "may" include the compensation to be paid for use of a freight car.

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9 For the year 1984, for example, the railroads' general mileage allowance tariff, without the updates sought, provided for allowances ranging from 9.7 to 54.6¢ per mile, depending on the age and original cost of the car. Had the allowances been updated in 1984, they would have ranged from 13.6 to 93.2¢ per mile. Complainants' verified statement no. 2 (Gerald W. Fauth, Jr.), appendix GWF-D, 4.

10 The ceilings range from 18 to 40¢, the most common being 24¢.

11 In addition, the Consolidated Rail Corporation (Conrail) withdrew from the national mileage allowance tariff and established its own system-wide schedule of allowances effective October 1, 1985. LOSAC considers the Conrail action to be subject to the same standards LOSAC urges for judging other covered hopper allowance actions.

Moreover, they note, if the agency does prescribe car compensation, §11122 requires it to consider a number of non-cost factors, including encouragement of efficient car use [§11122(a)], the transportation use of each type of car, the national level of ownership of each type of car, and other factors that affect the adequacy of the national freight car supply [§11122(b)].

The railroads argue that, when the supply of cars greatly exceeds the demmand, as it has in recent years, car compensation must be permitted to fall to reflect the current market values of cars. Such allowance reductions, they explain, allow freight rate reductions to stimulate traffic movement and greater car utilization, and signal investors not to make further car acquisitions that would aggravate the surplus. The railroads contend that requiring strict adherence to an allowance formula based on historical cost[12] under those conditions would contravene the statutory mandate to encourage efficient car use and to give consideration to the national level of car ownership. They note that Commmission decisions since the Staggers Rail Act of 1980 have uniformly affirmed the necessity to consider the non-historical cost factors in §11122 and to give greater effect to current market forces and present opportunity costs.[13]

The railroads note that, if they had published revised tariffs in adherence to the COC/LOSAC update formula in and after 1982, this would have produced large allowance

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12 By "historical cost," the railroads mean the car owner's original investment in a car plus a return on the original investment. They distinguish this cost concept from others such as "variable cost" and "opportunity cost," which they say are commonly used in lieu of historical or book cost.

13 *See* Ex. Parte No. 334 (Sub-No. 7), *Suspension of Car Hire Updates* (not printed), served January 2, 1986, slip op. at 1; *Car Service Compensation – Basic Per Diem Charges*, 1 I.C.C.2d 742, 749-50 (1985); and Ex Parte No. 328, *Investigation of Tank Car Allowance System* (not printed), served November 4, 1983, slip op. at 4.

rate increases when there was already a substantial surplus of covered hopper cars and when market responsive prices would have been falling. Allowance rate increases, they say, would have forced freight rate increases (so that they could recover the added allowance expense) and that these would have further depressed traffic movement and car use, injuring both shippers and carriers alike.

The railroads have responded to LOSAC's challenges to allowance caps and rate differentials published by individual carriers with detailed statements from the pricing officers of the railroads involved. These witnesses explain that their companies sought to remedy depressed market conditions, particularly for grain traffic, with reduced freight rates premised on use of surplus railroad-owned cars.[14]

When these carriers were asked to extend similar reduced rates to users of private cars, they could do so only by establishing allowance caps or zero-allowance rates with limited rate differentials because they could not have afforded to pay full allowances at the reduced freight rate levels. The railroads state that the shippers using private cars, many of whom are LOSAC members, willingly accepted many of the tariffs included in this complaint.

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14 For example, the witness for the Norfolk Southern Corporation testified as follows: *Under surplus conditions, we try to recover only the distance-related costs of using our own cars (such as repairs); we recognize that the market will not allow us to recover the time-related costs (such as the value of our original investment). Both we and our shippers are better off if we can get our cars moving at these low rates.* Defendants' verified statement no. 21 (R.M. VanHook), 17-18.

Nearly all the tariffs cited by LOSAC apply to grain. The railroads state that their rates on this traffic have been constrained by barge competition, by truck competition on short-haul movements, and by a weak market for grain. To enable American grain producers to compete in export markets, the railroads state that they have been forced to reduce their freight rates on grain an average of 26% since 1980.[15] Similarly, the carriers note that a cement tariff with an allowance cap cited by LOSAC provides a freight rate reduction on short-haul truck-competitive movements. As in the case of the grain tariffs, the railroads say that this rate reduction was made possible only by use of surplus rail-owned cars and feasible for private car application only with an allowance cap.

B. Consequences of fixed allowances. We begin our analysis by considering the practical effects that would flow from regulating covered hopper car allowances in the mmanner proposed by LOSAC.

One consequence is that the railroads would face enormous damage claims, possibly in the neighborhood of $600 million.[16] The financial consequences for the railroads could

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15 LOSAC's evidence also purports to show certain "zero-allowance" grain tariffs in which the rate for movements in private cars is actually higher than for movements in carrier-owned cars. The railroads state, however, that LOSAC's exhibit is inaccurate, because a regular allowance is paid on the private car movements, and the higher freight rate for private car movements merely serves as a partial allowance offset. The freight rate reductions on these movements ranged up to 48%, *Id.* at 17.

16 *See* note 2, *supra.*

be serious, since they would have no way of recouping additional costs incurred now for services provided in the past.

Another consequence, possibly even more serious in the long run, is that the railroads would lose the ability to set competitive freight rates on shipments transported in their own cars. To reach this conclusion requires several steps.

First, allowances would rise substantially if we prescribed them as requested by LOSAC.[17] As noted, when the present record was made, many tariffs that contained reduced freight rates on grain included allowance caps of 18 or 24¢ per mile. Without caps, the highest allowances under the general covered hopper allowance tariff would increase to nearly 55¢ per mile. If the updates sought by LOSAC were in effect, the highest allowances would increase to about 92¢ per mile.[18] If a modified formula were prescribed for the future, as requested by LOSAC, some allowances could rise as high as $1.19 per mile.[19]

Second, higher allowances would mean higher freight rates. We see no reason to doubt the railroads' declarations that they could not pay allowance increases of these magnitudes without increasing their freight rates. Most of the traffic transported in covered hoppers is subject to strong market-imposed pricing constraints and has been moving at reduced rate levels under prevailing market conditions, meaning that

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17 At the time the record in this proceeding was made, large surpluses of covered hopper cars existed. Currently, export grain sales have increased. The surplus of railroad-owned covered hopper cars has decreased and spot car shortages are occurring in the west. We expect that both freight rates and allowances will fluctuate due to changed market conditions such as these without regulatory intervention and will continue to be adjusted upward and downward as future market conditions dictate. Our discussion in this section applies to the consequences of regulation-induced allowance and rate increases that take place in disregard of market conditions.

18 Estimate for 1985. Complainant's verified statement no. 2 (Gerald W. Fauth, Jr.), appendix GWF-D, 5.

19 Estimate for 1985. *Id.*, appendix GWF-E, 5.

the railroads have had limited, if any, ability to absorb further costs at existing rate levels.

Third, freight rate increases would have to apply to shipments in carrier-owned cars as well as to those in private cars. When an allowance is published, it relates to a freight rate that applies regardless of car ownership. Thus, in increasing the rate for movements in private cars, the carrier would also be increasing the rate for movements in carrier cars, for it is the same rate. Where no allowance is published, there are dual rate scales, but LOSAC maintains that the differential between the private car rate and the carrier-car rate must be no less than a cost-based allowance. If the railroads must enlarge the rate difference and cannot further reduce the rate on private car movements, they would have to raise the rate on movements in carrier-owned cars.

Fourth, higher freight rates would make rail service more expensive for shippers that use carrier-owned cars. Higher

freight rates might or might not adversely affect movements in private cars. For shippers who own their cars, the higher freight rates could be offset by the higher allowances. Many shippers who lease private cars from third parties might also have benefits that would offset the higher freight rates.[20] For shippers who use carrier-owned cars, however, higher freight rates would clearly mean higher transportation costs if these shippers continued to use rail service. The effects of LOSAC's proposal on users of carrier-owned cars is a very serious concern, because the railroads own more than half of the covered hopper fleet.[21]

An important aspect of the pricing flexibility granted the railroads in the Staggers Act was the freedom to reduce freight rates to levels covering only short-run costs in depressed markets.[22] To exercise this flexibility on traffic moving in carrier-owned cars, an individual railroad should be able to set its rate at a level that covers (in addition to

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20 In many cases, allowances are paid to the car lessor rather than to the shipper. Private car leases often provide, however, that the shipper's lease payment obligations are reduced by the allowances earned by the car.

21 The record contains the following covered hopper ownership data, rounded to thousands: Railroads – 169,000; Private Car leasing companies – 95,000; Shippers – 36,000; Total Fleet – 300,000. LOSAC's shipper members own or lease about 65,000 of these cars. Sources: defendants' verified statement no. 6 (John J. Robinson), 6; complainant's verified statement no. 1 (Joseph C. Gasz), 2.

22 A rate that contributes to the going concern value of a carrier is conclusively presumed not to be below a reasonable minimum, 49 U.S.C. §10701a(c)(1). In determining whether a rate contributes to going concern value, the Commission may not consider "any expense that does not vary directly with the level of transportation provided." 49 U.S.C. §10701a(c)(4)(B). See generally Cost Standards for Railroad Rates, 364 I.C.C. 898 (1981), *aff'd sub nom Water Transport Association v. I.C.C.*, 684 F.2d 81 (1982). The Conference Committee report on the Staggers Rail Act states that: *All shippers as well as the carrier are better off if traffic which makes a contribution moves than if it does not, because the carrier is made financially stronger and need not rely as much on revenue from other shippers. The Conferees do not intend . . . that rates which are contributing to the going concern value of a carrier should be forced to be raised.* H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 90 (1980).

directly variable non-equipment costs) only the immediate cost that it incurs in providing a car. If it has an idle car available, the only equipment cost incurred may be the car maintenance cost attributable to the movement. If it must rent a car, its equipment cost is the rental fee, which is likely to be low during a car surplus. Certainly, from the standpoint of competitive pricing and the ratemaking flexibility created by the Staggers Act, a railroad should be free to set its rates in accordance with its own relevant costs.

If required to pay allowances based on the full historical cost of car ownership, however, the railroads would be compelled, for the reasons explained, to set their rates for movements in their own cars at considerably higher levels than their own car costs require during a surplus. The railroads indicate that they could lose a substantial amount of traffic as a consequence. It would seem anomalous for Congress to have emphatically decreed flexibility for railroad freight rates in competitive markets,[23] while at the same time mandating uniform and inflexible car compensation rates that render the goal of competitive grain freight rates unattainable. This brings us to the main question in this proceeding – whether the car compensation standard actually established by Congress permits recognition of market conditions.

C. Statutory requirements. LOSAC's principal argument – that the statute requires the Commission to prescribe

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23 The Staggers Act Conference Committee declared: *The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The Conferees believe that by allowing the forces of the marketplace to regulate railroad rates wherever possible the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers and rail employees.* Id., 89, The very first clause of the Rail Transportation Policy is as follows: *To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail. [49 U.S.C. §10101(a)(1)].*

private car allowances at least as high as historical costs regardless of the consequences for other factors listed in the statute – is simply wrong.

First, LOSAC ignores the fact that the Commission's mandate to set allowances in the first place is clearly discretionary. §11122 says that the regulations "*may include*" (emphasis added) the compensation to be paid. Thus, the agency is not required to prescribe compensation for any type of car. *See, e.g., Car Service Compensation – Basic Per Diem Charges* 1 I.C.C. 2d 742, 743-46 (1985) and Ex Parte No. 334 (Sub-No. 6), *Review of Car Hire Regulation* (not printed), served April 29, 1985, slip op. at 1-6. As previously noted, the ICC has never found it necessary to prescribe a uniform system of compensation to be paid for privately owned covered hopper cars, the cars at issue here. If the agency never prescribed allowances for these cars even in the heyday of regulation, it seems unlikely that Congress intended such action in the era of reduced regulation since the Staggers Act.

Second, the Commission has consistently recognized that, when it prescribes car hire compensation, it must consider the sometimes conflicting goals of: (1) a "fair return" on costs; and (2) the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars. *See e.g., Car Service Compensation – Basic Per Diem Charges, supra*, 749:

> Indeed, the statutory command that the Commission consider current cost of capital is tempered by the requirement that the Commission also consider the transportation use of each type of freight car, and other factors that affect the adequacy of national freight car supply.

See also Exemption from Regulation – Boxcar Traffic, 367 I.C.C. 747, 760 (1983); Ex Parte No. 334 (Sub-No. 7), *Suspension of Car Hire Updates* (not printed), served January 2, 1986; No. 39908, *Mileage Allowances for Covered Hoppers,*

Grain and Grain Products, BN (not printed), served December 5, 1985; *Order Granting Railroads Flexibility in Setting Per Diem Levels*, 364 I.C.C. 107, 109 (1980); and *Zone of Reasonableness for Car Hire Charges*, 364 I.C.C. 299, 306 (1980).

The courts have confirmed the Commission's longstanding and consistent interpretation in the only two cases where the issue has been raised. The Third Circuit made clear that statutory factors other than costs must be weighed before car compensation is prescribed in *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 996 (3rd Cir. 1980) (*Conrail*): "These factors are designated, we think, as important factors to be used in encouraging the efficient use of freight cars." The Third Circuit emphasized that the other statutory factors *must* be weighed before car payments are prescribed. *See also Brae Corp. v. United States*, 740 F.2d 1023, 1058-1059 (D.C.Cir. 1984), where the court cited the *Conrail* case with approval and noted that "§11122 presents a distinct statutory provision with specific requirements that the Commmission must satisfy when it chooses to impose a new regulatory format over the car hire relationship."

It is clear from the legislative history of §11122 that this statute permits allowances to reflect market conditions and to fall below historical cost recovery levels during periods of car surplus. The first statutory mention of car compensation based on ownership expense occurred in 1966.[24] It was eleborated to its present form in 1976.[25] The other statutory factors discussed by the railroads also originated in the 1966 and 1976 legislation, as did a provision authorizing the Commission to establish an incentive compensation element above ownership expense. The problem confronting Con-

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24 Pub. L. 89-430, §1, 80 Stat. 168, amending section 1(14)(a) of the Interstate Commerce Act (now §11122).

25 Pub. L. 94-120, §212(a), 90 Stat. 46, further amending section 1(14)(a).

gress and the Commmission during this period was that collective action by the railroads and regulatory action by the Commission had failed to produce car compensation levels high enough to stimulate a level of equipment investment that would overcome chronic car shortages.

By 1980, the car shortages were ending and the problem of surpluses was beginning to appear. In the Staggers Act, Congress deleted the incentive provisions of §11122. In its report accompanying the final bill, the Conference Committee interpreted the remaining provisions of §11122 in the light of current conditions and the new congressional policy of greater reliance on market forces.

The Conference Committee's report acknowledged the Commission's efforts to allow "per diem rates below basic per diem levels during periods of excess car supply."[26] It directed the Commission to continue to "examine means (such as flexible car hire) for making basic car hire more responsive to market forces."[27] Moreover, in a statement particularly relevant to allowances, which traditionally had not been prescribed, the Committee stated that, "[t]he conferees intend that marketplace decisions govern the railroad industry and its relationship with shippers."[28]

Congress viewed the existing language of §11122 as broad enough to embrace a market-oriented approach to car compensation. Whether or not the cost recovery sentence of

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26 H.R. Rep. No. 96-1430, 96th Cong. 2nd Sess. 90 (1980).

27 *Id.*, 117.

28 *Id.*, 118. This statement appears in the Committee's specific discussion of the subject of car compensation.

§11122(b) refers only to historical cost,[29] the other factors mentioned in the statute easily lend themselves to consideration of current market conditions, as we shall illustrate.

D. Application of statutory factors. We have established that the prescription of allowance rates is discretionary and that if we prescribe we must consider various factors. The question next posed by this case is whether the goals of the statute can best be served by allowing individual carriers to continue to publish allowances or by prescribing allowances for the entire industry. If actions of individual carriers are consistent with the statutory factors, we have no reason to displace those actions with a nationwide prescription. Indeed, requiring all carriers to set their allowances at the same level would run directly contrary to the preference expressed in the Staggers Act for individual rather than collective ratemaking,[30] as well as disregarding most of the factors in §11122.

In analyzing present allowances and those sought by LOSAC under the statutory factors, we will first consider cost of ownership. This factor has not been ignored in the setting of allowances for covered hopper cars. Coverage of ownership cost was a basic consideration in the development of the 1980 formula, which the railroads implemented in a general allowance tariff. That tariff remains on the books and still is the source of allowances on some movements, par-

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29 The railroads urge that the reference to "current cost" in this sentence be interpreted as referring to the present worth of a car or its "opportunity costs." While this appears to be a permissible interpretation, and one that is possibly justified by the Conference Committee's report, we do not rely on it today. While the sentence has traditionally been interpreted as referring to coverage of historical cost, we find no need to resolve the issue here.

30 The Conference Committee, in explaining the Act's severe limitations on collective ratemaking [see 49 U.S.C. §10706(a)(3)(A)], stated that, "railroads, shippers, and consumers will benefit from increased rail to rail competition." H.R. Rep. 96-1430, 96th Cong. 2d Sess. 113-114 (1980). *See also* 49 U.S.C. §§10101a(1) and (11).

ticularly those using specially equipped types of cars that the railroads do not own. On other movements, that tariff is often the point of departure for allowance modifications or caps.

Nevertheless, controlling weight cannot be accorded to coverage of the cost of ownership without regard to other considerations specified by §11122. At the outset, that section requires the Commission to "encourage the purchase, acquisition, and efficient use of freight cars." Encouraging purchase and acquisition, when read in the light of the Conference Committee's explanation that marketplace decisions are to govern, must refer to encouraging an appropriate level of car ownership, not a boundless continuing expansion of the fleet that disregards conditions of supply and demand.

Reinforcing this interpretation are the requirements in §11122(b) that we consider the "national level of ownership" of each type of freight car and "other factors that affect the adequacy of the national freight car supply." Clearly, Congress does not expect us to ignore the existence of an already adequate or excessive fleet in determining the level of car compensation.

Taking these factors into account, we are unable to conclude that the allowance levels sought by LOSAC are legally required. For the past 6 years, the national level of ownership of covered hopper cars has been considerably higher than necessary to meet the overall demand. Moreover, at the time most of the present fleet was acquired, allowances were far below the levels LOSAC now seeks. The basic COC/LOSAC formula, even without yearly updates, actually doubled the allowances that had been payable on the most expensive cars prior to 1980, when most car purchases took place. Furthermore, under the allowances that prevailed prior to 1980, there were no yearly updates. In considering these facts, we are unable to conclude that updates

under the 1980 formula are required to encourage acquisition of an appropriately sized covered hopper fleet.

Moreover, we note that the allowance caps of which LOSAC complains generally have not held allowances below the highest levels (18 to 24 cents per mile) that were in effect when the preponderance of the present fleet was acquired. Indeed, these caps seem to have been generally in line with the costs the railroads would have incurred to obtain leased cars in the open market at the time this record was made.[31] The capped allowances may actually have been generous in comparison to the small distance-related costs that the railroads would have incurred in using idle cars that they already owned. Thus, LOSAC has provided no empirical basis upon which we might conclude that the capped allowances have been inappropriate, under prevailing market conditions, for maintenance of an adequate fleet of covered hopper cars.

An especially important factor under §11122 is the requirement that the Commission encourage the efficient use of freight cars. From the standpoint of efficient car use, we believe that the allowances sought by LOSAC would be harmful. We are not shown how the major allowance increases it seeks, whether by updates, removal of allowance caps, or increasing of rate differentials, could occur without freight rate increases. Rate increases that disregard demand conditions would result in a loss of traffic moving in covered

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31 The railroads received offers of leased cars at rates ranging from 18¢ to 26¢ per mile and could have purchased four-year-old cars at only 40% of their original cost.

hopper cars and a reduction of freight car use.[32] Efficient car use, we believe, requires that car compensation not be set at levels that discourage car use when surplus conditions exist.

The other factor to be considered under §11122 is the "transportation use" of each type of freight car. The primary use of covered hopper cars is shown to be the transportation of grain. Because of demand and competitive conditions, the railroads have had to minimize rate levels in order to encourage rail transportation of grain. Most of the challenged allowance caps and rate differentials apply to this freight car use. Where covered hoppers have other transportation uses, and particularly where specialized equipment is used of a type that the railroads do not provide, the record suggests that the railroads have not found it necessary to resort to allowance caps to a significant degree. This pricing pattern appears unassailable from the viewpoint of responsiveness to market conditions.

Taking all the factors of §11122 into account, the assailed levels of car compensation on private covered hopper cars have not been shown to be unlawful. Under prevailing market conditions, reductions below full cost-of-ownership allowance levels have been justified by considerations of excessive fleet size and the need to maximize car use. In fact, the record in this case shows that allowing market based car hire returns, instead of prescribing fixed returns, best accommodates the various factors we are required by the statute to consider.

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32 As previously discussed, shippers of all covered hopper traffic would likely pay higher freight rates but shippers who own private cars would receive higher allowances and might be in no worse net position, while shippers using railroad-owned cars would have to pay higher rates. Even though higher allowances on private cars might operate mainly to decrease use of railroad owned cars, any decrease of car use through price increases not warranted by market conditions would be inefficient.

V. UNREASONABLE PRACTICE ALLEGATIONS

LOSAC also contends that the allowance caps are an unreasonable practice within the meaning of 49 U.S.C. §10701(a), because they are inequitable to shippers who were forced to buy cars during the 1970's and who relied on the availability of car allowances in deciding to make car purchases. LOSAC argues that it is unreasonable for the railroads not to pay allowances based on full ownership cost after they failed to meet their obligation to supply an adequate number of railroad-owned cars, verbally prodded shippers to acquire their own cars, and give tariff inducements for the use of private cars.

The railroads deny that the present private fleet was acquired because of any failure by the railroads to meet car supply obligations. they note that, during the escalating demand for covered hoppers in the 1970's, they added some 50,000 new railroad-owned cars to an existing fleet of 125,000. Although some carriers were short of capital during this period due to financial difficulties, there were also other reasons why the railroads did not acquire more cars. For one, the volume of private car orders was so heavy that the railroads had difficulty getting car manufacturers to fill the railroads' orders. Moreover, when demand for grain was heaviest, congestion at ports was a constraint on their ability to serve shippers regardless of car availability. Finally, the railroads could not justify the purchase of cars used only during peak demand periods, because they believed that over the long term the rates available from the traffic would not cover the cars' investment costs.

The railroads also contest LOSAC's claim that the private car fleet was acquired in reliance on cost-based allowances. They note that virtually all private covered hoppers were acquired before the 1980 formula became effective and during a period when allowances were no more than 18 to 24¢ per mile, compared to allowance rates as high as $1.19 per mile

now sought by LOSAC. The railroads also point out that product marketing advantages and tax benefits were important inducements for private car acquisition.

Without deciding whether the prohibition against unreasonable practices in 49 U.S.C. §10701(a) embraces broad equitable claims such as LOSAC's, we find the position taken by LOSAC to be unsupported by the evidence. First, as the railroads indicate, they acquired covered hopper cars to the best of their ability, to the extent that they could justify car investments based on projected revenue from the traffic. That is all the law requires. Railroads are not expected to acquire equipment that cannot be economically justified by the traffic available.[33] It follows that the shippers' or car investors' purchase of cars for peak loadings does not impose an equitable obligation on the railroads to pay the full cost of those cars through cost-based allowances. Such an obligation would not be different in substance from requiring the railroads to purchase the cars.

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33 The duty to supply cars is not absolute. *See Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981). The Commission may not require carriers to acquire equipment unless it finds that the amount spent will be recovered. See 49 U.S.C. §11121(a)(1)(B). We have specifically found in relation to covered hopper cars that: *[I]t would be a questionable use of limited railroad capital for the carriers to acquire all the equipment needed to handle the periodic peak traffic when these cars would otherwise sit idle.* No. 38692, *Shippers Committee OT-5 – Review of OT-5 Agreements* (not printed), served December 23, 1981, slip op. at 6.

In addition to a perception that railroad equipment would be inadequate at a particular peak period, shippers may have relied on allowances as a factor in making car purchase decisions. However, this point must be put into perspective. First, it is clear that the shippers' main reason for acquiring cars was to market their products.[34] Car purchasers also received substantial tax benefits, such as investment tax credits, interest deductions, and accelerated depreciation deductions.[35]

Moreover, even if car allowances were calculated on the basis of ownership cost when car purchases were made, the shippers had no guarantee that the same method of calculation would continue indefinitely. There is no evidence that they were promised a permanent continuation of formula-based allowances either by the Commission or by the railroads. At best, they were relying on what they perceived as a regulatory framework that they believed required such allowances. Regulation is not a guarantee that the status quo will continue.[36] Regulation reflects changes in law, changes in regulatory policy, and changes in factual circumstances. The duty of a regulatory body is not to do what it has always done in the past, but to do what is reasonable and in accord-

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34 For example, the witness for Bunge Corporation stated as follows: *The need for covered hopper cars [in the 1970's] was created by the immense volume of grain to be exported and the inability of the railroads to satisfy that need . . . Grain shippers and particularly exporters maintained huge investments in inland and export facilities. There were also millions of dollars tied up in grain inventory during the 1970's that was producing no return because of our inability to deliver to our domestic and export customers. The addition of cars to Bunge's private fleet became essential for marketing purposes and to meet contract delivery terms.* Complainant's verified statement no. 15 (Norman Walker), at 13.

35 Defendants' verified statement no. 8 (William J. Romig), at 7.

36 *See American Trucking Assn. v. Atchison, T & S.F. Ry. Co*, 387 U.S. 397, 416 (1967).

ance with law and public policy under present-day conditions.[37]

We are not convinced that the railroad actions have been contrary to reasonable expectations. One of the actions challenged is the railroads' refusal to make updates that would produce large allowance increases. The update provisions in question were not even in effect when most of the private car fleet was acquired. Moreover, the magnitude of the updates produced by the 1980 formula resulted from economic conditions that virtually no one anticipated beforehand: extremely high interest rates coupled with an economic recession. It is unlikely that shippers relied upon the prospect of receiving such updates when acquiring cars. Finally, even if any car purchaser had anticipated the updates actually produced by the formula, it should have had serious doubts either that the railroads would voluntarily publish such self-destructive allowance rate increases or that the Commission would require them.

Similarly, no reasonable reliance or expectation has been defeated by the challenged allowance caps and rate differentials under prevailing market conditions. First, many of the benefits for which the cars were acquired have already been realized, including the ability to move the shippers' traffic during peak flows and the tax benefits. Second, while allowances were reduced on many grain cars, the freight rates on grain traffic were generally reduced by much greater amounts.[38] The true concern of LOSAC's members may be

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37 In fact, investors who purchased securities of car investment companies during this period were advised in prospectuses that the earning power of the cars could be affected by, among other things, changes in governmental regulation.

38 For example, Union Pacific's average reduction in grain freight rates has been $1.12 per mile, compared to allowance caps that have reduced allowances by at most 25 to 30 cents per mile. Defendants' verified statement no. 4 (Thomas M. Caron),, 23; see also defendants' verified statement no. 22 (Peter C. White) 4-6.

that they expected to have more of a price advantage over their competitors who use rail-owned cars, but we do not see that regulation should give them a greater advantage than the value of the cars they provide, and in a car surplus, their cars, like the railroads' own cars, are of diminished value. If covered hopper cars are again in short supply, the value of cars will rise, and the compensation received by private car providers (and the advantage of these providers over users of rail-owned cars) can be expected to increase accordingly.

We conclude that private covered hopper car owners have no equitable claim to higher levels of car compensation than are required under §11122 and warranted under current market conditions. The statute does not guarantee them a particular return on investment nor do we believe that would be a reasonable policy when identical cars purchased by the railroads do not receive that protection.

VI OTHER MATTERS

A. Lawfulness of "zero-allowances" rates. A side issue raised by LOSAC in its challenge to the railroads' dual rate scales is whether "zero allowance" rates are lawful. LOSAC contends that private car use must be compensated by allowances, not by freight rate differentials. The cases cited by LOSAC merely stand for the proposition that allowances must be openly published and applied without discrimination. As the railroads note, however, "[i]t has long been accepted that railroads may eliminate allowance payments and instead compensate a shipper for supplying private cars by adjusting the freight rate."[39] Thus, they argue that LOSAC's

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39 Citing *Natural Gas Pipeline Co. v. New York Central R.R.*, 323 I.C.C. 75, 79 (1964) (*Natural Gas Pipeline*), and *Eastern Central Motor Carriers Ass'n. v. Baltimore & O.R.R.*, 314 I.C.C. 5 (1961), *aff'd sub nom. Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo.), *aff'd per curiam*, 379 U.S. 6 (1964).

view that dual rate scales with zero-allowance rates are unlawful is unfounded.

LOSAC quotes the following passage from a 1935 Commission decision:

> [In lieu of performing a service,] the carrier may compensate the shipper, as owner of the goods transported, by way of an allowance . . . for any services rendered which the carrier is legally obligated to perform under its line haul rates.[40]

This means the carrier is obligated to publish an allowance for a service rendered by the shipper only if the carrier is obligated to perform the service under its line-haul rate. Where a carrier publishes a rate specifically applicable only to movements in private cars, the carrier is not obligated to provide a car and has no obligation to publish an allowance.

That the Commission has long accepted dual rate scales with zero-allowance rates is reflected in the following passage:

> When a carrier offers a lesser service for a lower rate than the rate for a complete service, and the offer at the lower rate is accepted by the shipper, the carrier is not obligated to do more than it has offered to do for the lower rate, and no allowance can be made to a shipper for performing a service the avoidance of which is the consideration for the lower rate.[41]

A railroad escapes no legal obligation concerning car compensation by publishing zero allowance rates in dual rate scales. The adequacy of the differential is subject to the same tests as the adequacy of an allowance.

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40 *Pacolet Mfg. Co. Operating Allowance*, 210 I.C.C. 475, 477 (1983) (*Pacolet*).

41 *Natural Gas Pipeline, supra*, 99.

B. Market power. LOSAC also contends that strict adherence to an owner's-cost standard is necessary to protect car owners from unjust treatment at the hands of railroads with market power. LOSAC argues that the railroads have the power, absent regulation, to force car owners to accept inadequate compensation. It notes that each individual railroad has the ability to limit the supply of shipper cars on its lines by withholding OT-5 authority.[42] It also describes the railroads as "a very limited number of buyers who among themselves can fix the price at which they buy."

The railroads reply that LOSAC's OT-5 argument misconceives the nature of a free market. They observe that a railroad's withholding of OT-5 authority is equivalent to a refusal by the railroad to purchase the use of a car. In a free market, buyers are not coerced into buying; a seller assures itself of a competitive price, not by having the government require purchases or dictate minimum price levels, but by seeking out alternative bids from other buyers.

In their discussion of the market for covered hopper cars, the railroads describe a "buyer" as one who acquires a car from a supplier through purchase or lease, or through compensation (such as an allowance) for temporary use. These buyers include both railroads and shippers that buy or lease cars as well as railroads that pay allowances for temporary use of cars. Thus, the railroads state that there are many, not few, buyers for covered hopper cars.

We recognize that an important aspect of the Rail Transportation Policy is the protection of shippers from

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42 Under procedures specified in AAR Circular No. OT-5, use of a private car on a particular route requires prior approval by the originating carrier of the issuance of reporting marks for the car.

abuses of railroad market power.[43] LOSAC's argument, however, does not persuade us that rigid adherence to a historical-cost allowance standard is necessary in order to afford this protection.

First, we disagree that the OT-5 certification process has been shown to have any bearing on the ability of market forces to influence allowance levels. The act of a railroad in withholding OT-5 certification merely reflects a lack of need by that railroad for additional cars or a refusal to pay an allowance level that the carrier considers too high in relation to market conditions. As this OT-5 authority is exercised by individual railroads, we see no basis to consider it a *per se* abuse of market power. Moreover, we note that the railroads have offered to grant unlimited access to private cars if the car owners will accept market-based commpensation. No. 36169, *Shippers Committee, OT-5 v. Ann Arbor Ry.*, status report on negotiations filed July 6, 1987.

Second, the allowance caps and dual rate scales of which LOSAC complains have been the acts of individual railroads. No evidence has been introduced to support LOSAC's suggestion that the largest railroads are fixing allowances among themselves.

Finally, Commission scrutiny of individual railroad allowances under all the factors set forth in §11122 is still available. If particular instances of railroad abuse of market power do occur, individual private car owners are not without a remedy.

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43 The following policy declarations of §10101 a exemplify this aspect: *(6) To maintain reasonable rates where there is an absence of effective competition . . .; [and] (13) to . . . avoid undue concentrations of market power . . .*

VII. CONCLUSIONS

We conclude that the railroads' refusal to update covered hopper allowances under the 1980 COC/LOSAC formula after 1981, their publication of tariffs with specified upper limits on covered hopper allowances, and their publication of dual rate scales with differentials less than owners'-cost-based allowances are not shown to be unlawful under 49 U.S.C. §11122 or to be unreasonable practices under 49 U.S.C. §10701(a), given the market conditions reflected on this record.

For the same reason that we reject LOSAC's challenge to existing covered hopper allowances, we decline to prescribe covered hopper allowances for the future. To require rigid adherence to a uniform, nationwide formula for the future would elevate the cost-of-ownership factor above all the other factors specified by §11122, and would deprive individual railroads of the freedom to adjust allowance levels to prevailing market conditions. Although we are declining to prescribe a uniform system of car allowances, shippers and car owners who believe that a carrier or carriers have forced them to supply cars for unreasonably low compensation can seek prescription to remedy a specific problem.[44]

Having rejected the proposition that uniform nationwide allowances should be adopted and must conform to historical ownership costs even during a car surplus, we have fully disposed of the complaint. LOSAC has made no effort to show that specific allowances are unlawful under any stand-

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44 *See Bud Antle, Inc. v. United States*, 593 F.2d 865, 873 (9th Cir. 1979). [The Commission is authorized to determine the reasonableness of an allowance and award reparations to compensate an owner for services, provided the allowance was inadequate, or none had been published by the carrier. It can also require publication of an allowance prospectively (id., 876)]. If a carrier is abusing a particular shipper or car owner by unreasonably low allowances, the Commission has ample power to give effective relief.

ard that takes into account market conditions as they relate to all of the statutory factors.

We have indicated in discussing the record that the railroads' covered hopper allowances do not appear to be out of line when the railroads' own costs of providing cars are considered. The level of these costs, which will vary with the market conditions, would appear to be highly relevant information in any future case where the lawfulness of a particular allowance is challenged. Nonetheless, what we have said in this decision will not preclude an argument in a future case that an allowance should be higher (or lower) than a railroad's current car supply cost. We merely hold here that an argument concerning the lawfulness of allowances must reflect all factors in §11122, not just historical car ownership cost.

This decision will not significantly affect either the quality of the human environment or energy conservation.

VICE CHAIRMAN LAMBOLEY, dissenting in part:

I believe that the Commission should have exercised its discretion under §11122[45] to establish uniform allowances for covered hopper cars.

This proceeding represents the result of a mission failed by the parties. The parties have had a longstanding relationship which includes negotiation of agreements by which the shippers and the carriers achieve some balance of their

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45 49 U.S.C. §11122.

respective interests in the marketplace. The LOSAC group and the carriers have reached agreements in 1972 and in 1980; the latter of which included a provision for updating which seemed to recognize the dynamics of the market. However, current negotiations for updating amendment of the 1980 agreement have broken down, placing the matter before us.[46]

Since the parties have been unable to agree, I believe it is incumbent that the Commission, under the applicable standards, act to resolve the controversy.

Section 11122 provides for consideration of various factors in car allowance determinations. While the criteria question is answered by reference to §11122, the obligation question arises in §11122.[47] The obligation to provide cars for purposes of transportation is a part of §11121's common carrier obligation. From that proposition flows the option that the carrier has the opportunity either to provide the cars under its own ownership, or from some other third party source, be it a shipper, other carrier, or some other arrangement.

In the absence of the carrier's election to provide cars, it is acknowledged there is need and propriety for the third parties to provide cars. Indeed for a period of time, the LO cars were not available, and there was a car shortage. The market responded by having third parties make the investment. It is fair to say that if the market responds in that

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46 Whether the 1980 agreement remains binding is not clear. The fact that the Commission did not approve the agreement under §10713 stems directly from the fact the Commission indicated previously that *its* approval of such agreements was *not* necessary and, consequently, our approval or disapproval may not have been a needed action for the efficiency, the effectiveness, and the nature of the obligation to become binding.

47 49 U.S.C. §11121.

fashion, there is a reciprocal obligation then for carriers to pay for the use of those cars.

It is obvious that the market will go through cycles. As to car supply there will be times of car shortages, and of car surpluses. There are going to be economic and demand cycles, particularly for the commodity traffic utilizing this type of shipping container.

It seems to me we should take a long-term view, and not merely a short-term view. Failing that, we may well be here again struggling with the problem in another context. For example, the carriers may be here alleging exorbitant allowance requests, or a collective holding back to achieve a position in time of car shortage. Such an argument may very well have merit. Certainly it affects the ability to move that commodity, and shippers may have to pay such charges in their rate structure. Those circumstances appear to be the converse of the situation now raised by LOSAC in this time of surplus. Cycles come and go, and we should be sensitive to that.

We previously indicated in another case that it wasn't necessary to come to the Commission for approval of these arrangements unless the issue of lawfulness was present. Here, no one has raised any issue of lawfulness. Apparently the parties have at least operated in conjunction with that principle and came to the bargaining table in good faith. Consistent with that precedent, they reached an agreement, which they implemented in certain respects. They acted as if there was some kind of binding arrangement. If for nothing more than equitable estoppel considerations, the parties seemed to appreciate the nature and extent of their agreement.

Section 11122 is not the only provision applicable to prescription. Section 10706(a)(5)[48] has direct bearing on this case. As stated, the parties have reached agreements in the past, as late as 1980. They did so under the approved arrangements of the Commission which authorize shipper and carrier groups to negotiate. Section 10706(a)(5)(B) provides that when the negotiations break down, either party can come to the Commission for relief. At that point it is up to the Commission to set the terms and conditions for such allowances. The current situation presents just such a case.

At an oral argument LOSAC narrowly argued "do exactly as we propose," and the carriers simply argued that we "do nothing." Somewhere inbetween reposes our obligation. If we believe that LOSAC has unduly restricted the interpretation appropriate for §11122 and dismiss, what do we accomplish? If LOSAC's complaint is denied for the failure of its pleading that does not mean that LOSAC does not or could not otherwise fashion a claim for relief under other statutes. LOSAC could return and argue, as it does in part now, that the agreement it has with the carriers is being avoided and that is an unreasonable practice, or particularly that §10706(a)(5)(B) requires prescription of allowances by the Commission. I fail to appreciate a "dismissal and do nothing" approach. We have already had three cases in the Suspension Board in which we have denied relief to LOSAC. We have not indicated in any of those three suspension cases what we use as criteria in examining these cases. We are apparently unwilling to do so now.

If we reject the very narrow LOSAC interpretative approach, i.e., the cost of investment, and hold that an all-factor consideration is appropriate, we are left with the agency responsibility to determine whether or not the allowances, the caps and the differentials are themselves consistent with

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48 49 U.S.C. §10706(a)(5).

the provisions of the all-factor approach under §11122. The fact remains that, subject to appropriate statute of limitations, LOSAC can refile tomorrow, with a restructured that complaint alleging an all-factor basis under §11122, requesting relief under §10706(a)(5)(B). The matter has not been resolved and the Commission may again be involved in the same dispute resolution absent prescription.

COMMISSIONER SIMMONS, dissenting in part:

I would have exercised the Commission's authority to establish allowances for covered hopper cars. When the issue is squarely before us as in this proceeding, the Commission has an obligation to eliminate uncertainty and provide some guidance to parties concerning the standards which will govern car allowances in the future. The majority's refusal to embark on this task may have limited adverse effects during the present situation of oversupply. If car shortages develop in the future, however, the willingness of shippers and investors to acquire cars will certainly be restrained by the absence of any Commission guidelines on compensation for use of these cars. Thus, in my view the refusal to establish allowances in this proceeding is short-sighted and not in the public interest.

It is ordered:

1. The complaint is dismissed.
2. This decision is effective on August 31, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley and Commissioner Simmons dissented in part with separate expressions.

APPENDIX

Changes in Mileage Allowances on Private Covered Hopper Cars Since 1949

DATE EFFECTIVE	ALLOWANCE PER LOADED MILE (cents)	TARIFF REFERENCE
05/01/49	4.5	Not Available
07/01/52	6.4	Not Available
09/01/57	7.4	Not Available
09/01/58	8.0	Not Available
01/01/60	9.0	Not Available
09/01/63	11.0	Not Available
05/01/73	13.0	7-D, ICC H-60
03/01/76	13.0-15.0	7-F, ICC H-68, Supp. 5
02/01/77	11.0-18.0	7-F, ICC H.68, Supp. 24
07/01/78	11.0-24.0	7-F, ICC H-68, Supp. 46
10/01/80	7.76-25.99	6007-G, Supp. 20
07/01/81	7.76-33.14	6007-G, Supp. 38
11/01/81	9.68-39.45	6007-G, Supp. 45
07/01/82	9.68-54.56	6007-H, Supp. 5
02/01/83	10.3-57.9	6007-H, Supp. 24
08/01/83	9.7-54.6	6007-H, Supp. 24

NOTE: The general method of publication of allowances prior to October 1, 1980, was on the basis of cents per mile, loaded and empty. However, many carriers during this period went individually to a loaded-mile-only basis. Only the loaded mile rate (twice the loaded-plus-empty mile rate) is shown above. The COC/LOSAC agreement, which was implemented October 1, 1980, provided only for allowances on a loaded-mile basis.

Source: Complainant's verified statement no. 1, appendix B.

APPENDIX C

STATUTES INVOLVED

49 U.S.C. §11122, as it presently reads:

(a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car and other factors that affect the adequacy of the national freight car supply.

49 U.S.C. §1(14)(a), as Amended
May 26, 1966, Pub. L. 89-430 §1, 80 Stat. 168

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common car-

riers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

49 U.S.C. §1(14)(a), as Amended
February 5, 1976, Pub. L. 94-120, 90 Stat. 46[1]

(14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of any interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the pensalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, con-

1 This is the statute "replaced" by the revised §11122.

tribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive elements applicable to any type of freight car in the Commission finds that the supply of such type of freight car if adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

49 U.S.C. §10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle –

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

Section 3(a) of the Act of October 17, 1978
Pub. L. 95-473, 92 Stat. 142, Revising and
Recodifying the Interstate Commerce Act:

Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced . . .

APPENDIX D

LEGISLATIVE DEVELOPMENT OF 49 U.S.C. §11122

Title 49 U.S.C. §11122 currently provides:

> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –
>
> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and
>
> (3) sanctions for nonobservance.
>
> (b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

This provision is derived from what was originally enacted by the Esch Car Service Act, May 29, 1917, ch. 23, 40 Stat. 101, which, in pertinent part, provided:

> The Commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish

> reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Section 402 of the Transportation Act of 1920, February 28, 1920, ch. 91, 41 Stat. 476, made that provision section 1(14) of the Interstate Commerce Act and amended it to provide:

> (14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.[1]

The Motor Carrier Act of 1935, August 9, 1935, ch. 498, 49 Stat. 543, changed the reference in section 1(14) from "this Act" to "this part" pursuant to the following provision:

> That the Interstate Commerce Act, as amended, herein referred to as "Part I," is hereby amended by inserting at the beginning thereof the caption "part I," and by substituting for the words "this Act," wherever they occur, the words "this part," but such part I may continue to be cited as the "Interstate Commerce Act," and said Interstate Commerce Act is hereby further amended by adding the following part II.

Section 4(a) of the Transportation Act of 1940, September 18, 1940, ch. 722, 54 Stat. 901, redesignated section 1(14) as section 1(14)(a) and amended it to provide:

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1 Underlining identifies newly-added provisions.

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

Section 1(14)(a) was further amended on May 26, 1966, in Pub.L. 89-430, §1, 80 Stat. 168, to provide:

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rulings, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will

provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commissionn finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Section 212(a) of the Railroad Revitalization and Regulatory Reform Act, February 5, 1976, Pub.L. 94-120, 90 Stat. 46, amended section 1(14)(a) to read as follows:

(14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight cars, and to other factors affecting the adequacy of the national

> freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

As part of a comprehensive revision and recodification of the Interstate Commerce Act, section 1(14)(a) was restated, without substantive change, in Pub.L. 95-473, October 17, 1978, 92 Stat. 1421, as 49 U.S.C. §11122(a) and (b), to read as follows:

> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –
>
> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle.
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the

locomotive, freight car, or other vehicle, whether or not owned by the rail carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b)(1) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

(2) The Commission may increase a rate of compensation determined under paragraph (1) of this subsection by an incentive element only when the Commission finds that the supply of a type of freight car is inadequate and an incentive element will compensate freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and national defense. The Commission may exempt that incentive element from the compensation to be paid by a carrier or group of carriers when the Commission finds that exemption is in the national interest.

Section 224(a) of the Staggers Rail Act of 1980, Pub.L. 96-448, Title II, October 14, 1980, 94 Stat. 1929, effected the most recent change in 49 U.S.C. §11122, repealing paragrph (b)(2) thereof, deleting (1) in subsection (b), and leaving the entire section in the form set forth at the beginning of this appendix.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1486 **September Term, 1988**

Lo Shippers Action Committee,

Petitioner

v.

Interstate Commerce Commission and United States of America

Respondents

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 18 1988

CONSTANCE L. DUPRE
CLERK

BEFORE: Mikva and Sentelle, Circuit Judges and Palmieri*, U. S. Senior District Judge for the Southern District of New York

ORDER

Upon consideration of petitioner's petition for rehearing filed November 4, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner/CB

Robert A. Bonner
Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(d)